No. 13289

United States Court of Appeals
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON DEPARTMENT OF GAME; STATE OF WASHINGTON DEPARTMENT OF FISHERIES; and WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., a corporation,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent,

CITY OF TACOMA,

Intervener.

BRIEF OF INTERVENER CITY OF TACOMA

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JURISDICTIONAL STATEMENT

This is a proceeding under Section 313 (b) of the Federal Power Act (16 USCA 791a *et seq.*) to review an order of the Respondent Commission, issuing a license to the Intervener City of Tacoma to construct, operate and maintain a water power project on the Cowlitz River (a tributary of the Columbia) in Lewis County, Washington.

The jurisdiction of the Commission over such project and to issue a license therefor is conferred by Sections 4 (e) and 23 (b) of the Act.

The Intervener on August 6, 1948, pursuant to the provisions of Section 23 (b), filed with the Commission its

Declaration of Intention to construct such project. After investigation and notice to the State, the Commission on March 8, 1949, made and entered its findings and order that the construction, operation and maintenance of such project would affect public lands or reservations of the United States and the navigable capacity of the Cowlitz River and the interests of interstate and foreign commerce, and that such project was under its jurisdiction, and directing that before commencing construction the Intervener obtain a license from it so to do. (R. 539). It is the order, dated November 28, 1951, issuing such license that is here for review.

No challenge has been made to the Commission's basic determination of jurisdiction, and the same is not an issue here.

STATEMENT OF THE CASE

We think a more complete and counter statement necessary. It will to a great extent answer Petitioners' contention that the Commission's Findings are not supported by substantial evidence. We will follow generally the same headings as used by Petitioners.

The Parties

The State of Washington is not a party to this proceeding. The two State Departments of Fisheries and Game were interveners before the Commission and are Petitioners here. The Attorney General, acting through designated special assistants, appeared in their behalf before the Commission in opposition to the project. The Attorney General also, acting through another special assistant, appeared before the Commission in behalf of that segment of the people of Washington, substantial in number, favoring the

project. He was thus through his special assistants on both sides of the controversy, and the State as such on neither. This he is permitted to do under the laws of Washington. *Reiter vs. Wallgren,* 28 Wn. (2d) 872, 184 P. (2d) 571.

The State Departments have no standing for review under Section 313 (b). If Chapter 9, Laws of 1949 is superseded by the provisions of the Federal Power Act, and invalid, the two Departments and their representatives are here merely under color of office.

Petitioner Washington State Sportsmen's Council, according to its own statement, is a non-profit organization of residents of the State of Washington "dedicated to the preservation and protection of the resources of the State of Washington and their recreational value". It has no statutory or official functions and its members have no more or different interest in the resources of the State than its citizens generally. It is not a "party aggrieved" by the Commission's order.

Petitioners on page 3 of their opening brief refer to the Commission as an "administrative body". This is an error. The Commission is rather a "legislative agency". In issuing the license here challenged it acted as the agent of Congress, and its act in so doing was a legislative act. *First Iowa Hydro Electric Coop. vs. Federal Power Commission,* 328 U.S. 152, 90 L. Ed. 1143; *U. S. ex rel Chapman vs. Federal Power Commission,* No. 28 and 29, October 1952 Term, U. S. Supreme Court, decided March 16, 1953.

Intervener is a municipal corporation and city of the first class of the State of Washington. It is, along with other cities and towns of the State, granted power under RCW 80.40.010 *et seq.* to engage in the generation, transmission and distribution of electric energy for heating, lighting,

fuel and power purposes within or without its borders. This grant of authority has not in any way been modified or amended. It remains unchanged, except for such effect, if any, as the passage of Chapter 9, Laws of 1949, which makes no reference to municipalities or their powers, may be determined to have thereon.

The Proposed Project—Its Scope and Importance

The proposed project includes:

(1) A 185 foot high, 850 foot long dam near Mayfield at about Mile 52 on the Cowlitz River; a 13½ mile long reservoir with a storage capacity of about 127,000 acre feet, a drawdown of 10 feet and useable storage of 21,000 acre feet; and a power house with an initial installed capacity of 120,000 K.W. in three units, with provision for a fourth unit of 40,000 K.W.

(2) A 325 foot high, 1300 foot long dam near Mossyrock at about Mile 65 on the Cowlitz River; a 21 mile long reservoir with a storage capacity of 1,371,860 acre feet, a drawdown of 100 feet and useable storage of about 823,620 acre feet; and a powerhouse with an initial installed capacity of 225,000 K.W. in three units, with provisions for a fourth unit of 75,000 K.W.

(3) Fish ladders, traps, hatcheries and other fish handling facilities and protective devices.

(4) A transmission line approximately 58 miles long leading from said power plants to Tacoma, with substations, switchyards and appurtenant facilities. (R. 553-55).

The estimated cost thereof is approximately $142,000,000, including over $7,000,000 for such fish handling facilities. (R. 545). The project would increase the

present combined total installed capacity of all plants in the Pacific Northwest by approximately 10%. Its estimated capacity when completed is 460,000 K.W. as against a present total installed capacity in the region of 4,700,000 K.W. (R. 524).

Because of its nearness to the heavy load centers west of the Cascade Range and the diversity of rainfall and run-off between its location and the watershed serving the main Columbia River plants it will fit more advantageously than any other prospective plant into Pacific Northwest power pool requirements. (R. 524).

The electricity which can be produced and made available to the City and the Pacific Northwest by the project will retail at approximately $10,000,000 annually, even at Tacoma's present record low rates, and all power that can be produced therefrom will be readily salable. The project is self liquidating and economically, financially and engineeringly sound. (R. 4260).

In addition to its power advantages the project possesses large navigation benefits, equivalent to six inches channel dredging in the lower Cowlitz River, and flood control benefits sufficient to reduce the maximum flood of record on the Cowlitz by 50%, and to confine the river to bank full capacity. It also has prospective recreational benefits from the reservoir lakes which would be created. (R. 540).

The only detriment to flow from the project would be some possible fish losses. According to the State Departments' own estimate, as contained in Exhibit 25, three-fifths of the fish resources above the dams can be maintained through trapping and artificial propogation in hatcheries, and with intensive propogation it may be possible to main-

tain the whole. If the City's proposed new fish handling facilities prove out, an increase in fish production is possible. (Ex. 8, R. 386).

Conflict between State and Federal Laws

This conflict clearly exists. Chapter 9, Laws of 1949, prohibits outright the construction of any dam over 25 feet in height on the Washington tributaries of the Columbia River below McNary Dam. The Federal Power Act, Section 10 (a), authorizes and encourages dams and other works where "in the judment of the Commission" they are "best adapted" to a comprehensive plan for improving a waterway for the benefit of interstate and foreign commerce, water power development, and other beneficial public uses. Under the State act no consideration or effect can be given to these beneficial uses and no dam constructed even if it is found to be "best adapted" to such uses. Compliance cannot be had with the State act if effect is given to the Federal one.

As to the necessity of obtaining a permit from the State Supervisor of Hydraulics under RCW 90.20.010 et seq. the situation is the same. The Federal Power Act does not contemplate dual authority with a duplicate system of conflicting permits, and such a system would be unworkable. Further, it is not to be expected that the State Supervisor would entertain an application for such a permit so long as the validity of Chapter 9, Laws of 1949, is undetermined. Petitioners take the anomalous position that Intervener should obtain such a permit as a prerequisite to obtaining a license here, while at the same time asserting that the State Supervisor is without authority to issue such a permit under Chapter 9, Laws of 1949.

It is further not to be expected that the State Departments of Fisheries and Game who now oppose the project would entertain consideration under RCW 75.20.100 of complete plans and specifications for fish handling facilities for the project and grant approval thereof, while at the same time insisting that the whole project is prohibited by Chapter 9, Laws of 1949. The obtaining of such prior approval of fish handling facilities is nowhere made a prerequisite to the obtaining of a Federal License. The proper procedure is that specified in the Wildlife Resources Act of August 14, 1946 (16 USCA 662), and in Articles 30 and 31 of the License here issued to Intervener. (R. 559).

Pacific Northwest Power Situation

There is a dire need for more power in the Pacific Northwest. The Federal Power Commission and National Defense Resources Board Reports show this area to be the most critical in the United States. Water power development is and will continue to be the basis of the economic growth of the region, which has no oil or substantial coal resources, but does possess approximately 40% of the nation's hydro electric power potential. (R. 77).

Because of the power situation the Washington Public Service Commission in 1949 issued an order applicable to the private power companies under its jurisdiction (Ex. 60), directing them to take on no new loads of more than 500 K.W., whether for existing or new customers, nor to take on any space heating loads. This requirement has been continued and, although legally not applicable to publicly owned plants has voluntarily been followed by them. (R. 1266).

The Department of the Interior in a letter, dated October 20, 1949, to the Commission (Ex. 6, p. 6), stated:

> "These studies indicate that the Pacific Northwest region will be able to meet most of its power requirements during the next several years only if water conditions in the rivers are average or better."

The above was written several months before the present Korean situation developed and before the greatly increased need for large additional sources of power for aluminum and other defense purposes. (R. 1376-1378).

The acute power shortage in the region is stressed in statements of the Pacific Northwest Utilities Conference Committee made June 22, 1947, January 6, 1948, and April 14, 1949, in each of which it is urged that the federal agencies expedite their plans for additional generation on the Columbia River. (Ex. 21, sub. Ex. 3, 4 and 5).

The Bonneville Power Administration in its 1950 Advance Program (Ex. 23) gives a comprehensive statement of the federal program and discusses requirements, resources, load growths and other pertinent data necessary to proper planning and development. This statement estimates that in a minimum water year it will not be until 1957-58 that power capability is sufficient to meet requirements. Such exhibit shows that the Pacific Northwest population increased from 1940 to 1949 by 44%, the United States only 13%, and that the estimated increase for 1950 to 1959 is 14% and for the United States only 6%.

The above exhibits show that in order to meet the demands in the Pacific Northwest by 1958, even without consideration of aluminum development and defense needs, it will be necessary to develop the four proposed plants on the lower Snake River, and also Hungry Horse Dam, McNary Dam, Chief Joseph Dam and Hells Canyon Dam,

and the Rosa and Chandler projects. Some of these are still unauthorized and most are very doubtful of early development. So far the tendency has been for these programs to fall behind schedule. (R. 1376).

In view of the present national defense program all of the foregoing estimates must be considered as extremely conservative. Almon D. Thomas, an electrical engineer on the Commission's Staff, in testifying to the estimates contained in Exhibits 52 to 56B, stated that in his opinion the actual load experienced in future years would exceed his estimates, but that he seriously doubted that they would be less. (R. 4131).

On the basis of the Intervener's history its load has grown at the rate of approximately 10% compounded annually even in the face of conservation measures and the refusal to contract for large blocks of power which industries have requested. This means doubling every seven years. (R. 62). Plate 16 of Exhibit 10 shows graphically that using this rate of increase the City will require all of the energy produced from these projects for its own use by the middle of 1956, and at a time when according to the federal program, even if it keeps it's schedule, there will still be a need for additional generation.

The above estimates are made upon the basis of the Intervener now being and hereafter continuing to be a member of the Pacific Northwest Power Pool. If it was not for this pool, the situation would be greatly worsened. The fact that the Intervener, as a municipality, may be legally entitled to a preference in the purchase wholesale of Bonneville Power, affords no relief to the regional situation and no aid to Intervener when there is no power for sale. In the past when programs of curtailment have been necessary, it has been shared in by the municipalities along with others. (R. 1376).

Public Support of and Need for Project

That the segment of the public favoring the project is substantial ,and the benefits to be obtained therefrom great, was further attested by the evidence presented at the public hearing held at Tacoma, Washington, on November 20-21, 1950.

There appeared in support of the project approximately 50 local and statewide labor organizations, representing thousands of members, giving their all-out backing to the project in the interests of personal comfort, convenience, jobs, business and industrial growth, and national defense, and all that these things mean to people. (R. 2541-2597).

Several veterans' organizations, including the American Legion, Veterans of Foreign Wars, Amvets and Disabled American Veterans, also lent their support on the above grounds, particularly stressing national defense. (R. 2615-2630).

Civic clubs, professional associations and commercial interests, including Chambers of Commerce, the Seattle Development League, the Professional Engineers Association, and the General Contractors' Association, not only from Tacoma but from throughout the State, supported the same point of view, particularly stressing power values and needs. (R. 2605, 2630, 2662, 2673).

Business and industrial concerns, including the West Coast Grocery Company, the St. Paul and Tacoma Lumber Company, the St. Regis Paper Company, Pennsylvania Salt Mfg. Co., Hooker Electro Chemical Co., American Smelting and Refining Co., and Port of Tacoma, told of their own and other business and industrial need for power in the Pacific Northwest generally and Tacoma in particular. (R. 2630-2654).

Agricultural interests, through representatives of the State Grange, Washington Farm Bureau, Washington State Development Association and National Reclamation Association; power groups, through representatives of Seattle City Light, the Washington State Public Utility District Association, the Northwest Public Power Association and the Inland Empire Waterway Association; extended their support, stressing the widespread need and overall value of power as compared with other factors in the case. (R. 2489-2540, 2597-2615, 2668).

Residents and officials of the several cities, towns and communities of Lewis County, and along the Cowlitz River both above and below the sites of the proposed dams, made known their desires and presented a petition with over 3,000 names endorsing the project. (R. 2489-2526).

Carlton Nau, General Manager of the American Public Power Association, comprised of some 700 publicly owned electric operating utilities scattered throughout the country, testified that the Cowlitz project had been endorsed by the Executive Committee of that Association. He also quoted from a National Security Resources Board's statement of April, 1950, stressing the importance to national defense of the early development of the project. (R. 1178).

Kinsey Robinson, President of the Washington Water Power Company, a private utility serving territory in eastern Washington, Idaho and Montana, stressed the acute power situation in the Pacific Northwest and testified that his company would be glad to purchase power from the City of Tacoma if it should have the same available for sale. (R. 913).

Opposed to the above were commercial fishery interests, sportsmen's associations, and some commercial and

business organizations residing at Longview and Kelso, Washington, at the mouth of the Cowlitz River, and at Astoria, Oregon, which is the site of the large commercial fishing interests located at the mouth of the Columbia River. Most of these people based their opposition on the contention that the fishing and recreational interests they represented would be hurt. They made no attempt to analyze the comparative values of the other factors involved. (R. 2687-2830).

The Cowlitz River and its Fishery

Despite the statement of Petitioners, the watershed of the Cowlitz River is not in a particularly remote or isolated part of the State. The proposed dams are within 50 airline miles of Tacoma, and 80 of each Seattle and Portland, and only a few miles easterly from main Highway 99 connecting these cities.

The Cowlitz River is an important producer of fish. It is not, however, anywhere near as important as Petitioners claim. For confirmation we turn to a Report prepared by the two state departments in 1948. (Ex. 25).

In the Report (Ex. 25, p. 8) the annual value of the salmon and trout produced on the River above Mayfield Dam (the lower one) is estimated at $571,710 on the basis of the average price paid to fishermen, and $938,983 on the basis of wholesale commercial values, which include costs of buying, hauling, delivery, cleaning, dressing, grading, icing, boxing, canning and freight charges for delivery to market. In the figures are $202,581 and $433,147, respectively, representing the value assigned to the portion of the whole catch constituting the sportsmen's part thereof. Eliminating these sportesmen's catches, the commercial values are $349,129 and $505,837, respectively. Valuing

the sportsmen's catch at the rate per pound assigned to the commercial catch and adding it to the commercial values, the figures would be approximately $395,000 and $570,000, respectively.

Both the Examiner and the Commission found the net dollar value of the fish attributable to the area above Mayfield Dam to be approximately $600,000, and, after excluding strictly recreational value therefrom, $515,000 (Finding 44, R. 549). Both found there would be no injury, and possibly some benefit, to the fish below Mayfield Dam (Finding 48; R. 550).

The species of fish found in the Cowlitz River are Fall Chinook, Spring Chinook, Silver Salmon and Steelhead and Cutthroat Trout. (R. 196). On the basis of past experience it should be possible through artificial propogation to maintain the runs of Fall Chinook and Silver Salmon, representing 60% in value of the above sums. (Ex. 25, pp. 10-11). As to the Spring Chinook and Steelhead and Cutthroat Trout, intensive artificial propogation is suggested as a possible means of eliminating loss, but doubt expressed as to the extent of success to be expected. Assuming no success, the above sum would still be reduced by 60% or to approximately $200,000 annually. But some success has been experienced with these species. With an intensive program it does not seem unreasonable to expect that the loss would be cut in half, or to not to exceed $100,000.

The above gives no effect whatever to the proposed fish handling facilities, other than hatcheries, by the Intervener's engineers and biologists. It is the City's position that its proposed fish handling facilities are worthy of further tests and experimentation and trial, and that there is every probability that they will work. It proposes to spend

$7,000,000 in support of this idea, which is equal to the total value of the fish involved for a period of over 13 years.

But should the proposed fish handling facilities, other than hatcheries, fail, the power values would still far outweigh the fish losses, and to the power values would be added those of navigation, flood control, recreation, and national defense.

The Comprehensive Plan for the Columbia Basin

We believe that this heading, and the material which Petitioners have set forth thereunder is misleading. The problem before the Commission was not the whole Columbia Basin, but the Cowlitz River, which is a separate "waterway". What is its "best adapted" or most beneficial use?

The great decline in the fish resources of the Columbia River occurred long before construction of Grand Coulee and other dams on the Columbia. This is attested by the territorial act of 1877 cited on page 39 of Petitioners' brief. It was passed over 50 years before the construction of Grand Coulee Dam. In the preamble the legislature then declared:

> "Whereas, it is well known that the salmon of the Columbia River and tributaries are rapidly diminishing in numbers to the injury of the public, and threatening if not averted to materially prejudice the interests of trade and commerce, therefor:"

The Army Corps of Engineers' "Review Report on the Columbia River and Tributaries" is comprehensive in that it covers all the individual power sites subject to possible development on the river system. It does not purport to determine the order of their development, or whether by the Federal Government or private or public

interests. It does not direct development of the upper river for power, and preserve the lower river for fish. It deals primarily and basically with navigation, power, flood control and irrigation development.

Historically, the first dam constructed on the river was at the lowest possible site—Bonneville. Recently construction at the second lowest site—The Dalles—was commenced. McNary Dam, well along, is not far up the river, and Ice Harbor, the lowest site on the Snake River, has recently been recommended for construction. The progression of development has been from downstream to upstream, rather than the opposite, and this is understandable. The heavy load centers are in the downstream area.

In the Department of the Army Section 4 (e) Report to the Commission (Ex. 5) the Department says that the Review Report dated 1 October 1948 shows a total of nine potential power sites in the Cowlitz Basin, the two most favorable of which are those at Mayfield and Mossyrock, but that no recommendation is made in the Review Report for development by the Federal Government because of the interest of local agencies (Tacoma) in undertaking such development and because of the need for correlation of such development by local interests with the need for preservation of fisheries resources. If the Army meant that the Cowlitz Project was out of harmony with its basin plan, it did not say so when asked for comment in this proceeding.

The Lower Columbia River Fisheries Plan

This plan was prepared by the U. S. Fish and Wildlife Service and first published in 1947 (Ex. 31). It suggests the expenditure of $20,000,000 over a period of 10 years by the Federal Government, acting through the state

agencies, for rehabilitation of fish resources, to compensate for losses resulting from federal dam construction (Ex. 31, p. 7). The proposed expenditures, other than relatively small amounts for water resource, engineering and biological surveys, are for stream improvements, consisting of laddering 76 falls, screening of diversions, removal of log jams and debris, and for the construction of 28 fish hatcheries. The 76 falls to be laddered and 28 hatcheries to be built are specifically listed, and account for the bulk of the proposed expenditure (Ex. 31, pp. 14-18).

In accordance with the requirements of The Wildlife Resources Act of August 14, 1946 (16 USCA 661 et seq.) this plan was included in and made a part of the 1948 Review Report. In due course the Review Report was approved by the Chief of Engineers and by the Federal Power Commission as constituting a dsirable and coordinated "basic framework" for basin development. Neither approval went further than this (R. 248). The position of the Federal Power Commission in this respect is made clear by its Opinion in this case (R. 528). Congress has not approved either the 1948 Review Report or the proposed fisheries plan. The appropriations which it has made for stream improvements and hatcheries are general in terms and are in no way inconsistent with development of the Cowlitz River. One could easily be favorable to both the appropriations and the development.

This Lower Columbia River Fisheries Plan when originally conceived (Ex. 31) did not include thought of the refuge or sanctuary now proposed, and no reference thereto or to the prohibition of further power development on the lower tributary rivers is made therein. Yet the original plan listed all the items included in the proposed $20,000,000 expenditures. Only a small amount of these

expenditures are planned for the Cowlitz River. It includes two hatcheries, one of which is on the Toutle River which joins the Cowlitz River below the dams, and the other is on the Cowlitz River above the Mossyrock reservoir. These hatcheries could be constructed and used whether the dams are constructed or not. All other items in the plan can go forward and be constructed and serve to the same extent of usefulness as they could if the Cowlitz dams were not built. No item of the whole plan need be changed.

On page 11 of their brief Petitioners refer to the President's Water Resources Policy Commission as specifically mentioning the problem of the Cowlitz, and as agreeing that the integrity of the Lower Columbia River Fisheries Plan should be preserved. The President's Commission in its report does speak of the Cowlitz, but says that the matter was being considered by the Federal Power Commission in this proceeding, and that "Definite conclusions have not yet been reached in this project."

Mr. Barnaby, of the U. S. Fish and Wildlife Service did refer to the Cowlitz River as the keystone of the fisheries plan and say that if the dams were built, the whole plan might as well be abandoned. Mr. Barnaby's feeling and thinking, however, is displayed by his testimony on cross-examination that he felt that if any loss of fish resulted from utilization of the Cowlitz River for power, the dams should not be built and, if they were built, even with that small loss the whole Lower Columbia River Plan should be abandoned (R. 3644). There are 85,000 spawning fish above Mayfield, according to the State Fisheries Department's estimate (Ex. 28, page 6). 5% of these is 4250 or 2125 spawning pair. To save these Mr. Barnaby would forego the benefits of a well conceived and centrally located power plant producing over $10,000,000 retail value

of power annually (R. 4260). Conversely, if he lost this small number of fish, he would abandon all the other fish gains that can be obtained from the important improvements and expansions of the Lower Columbia River Fisheries Plan. We stress this matter because we feel that Mr. Baranby's thinking and his idea of fish values is illustrative of that of other of the fishery witnesses in the case. Their thought is that the construction of the proposed project, no matter how valuable otherwise, is unjustified if it results in *any* fish losses.

The Proposed Fish Facilities

The City's proposed fish facilities include the full hatchery program suggested by the two state Directors in their 1948 Report on the Cowlitz River (Ex. 25). According to the State Directors' statements in that report these hatchery facilities should maintain the Fall Chinook and Silver Salmon runs, and if intensively applied, might sustain the others. Petitioners in their brief see fit to ignore hatchery facilities entirely. They similarly tried to ignore them in the proceeding before the Commission. These trapping, hauling and hatchery facilities would alone eliminate at least three-fifths of the claimed losses, and certainly are entitled to great weight in this proceeding.

In addition to the above the City's engineers and biologists, in order to preserve and possibly increase the reamaining fish, suggest a system of ladders with intermittent resting pools to enable the fish to pass upstream, and a screening and fingerling passage system to enable them to pass unharmed downstream. (Ex. 10, 14).

The ladders are considerably higher than any heretofore constructed, and so are untried in operation. Fish have, however, not failed so far to make their way up what-

ever height of well designed ladder has confronted them. Dr. Hubbs testified that they should consume no more energy in making their way up the ladders and through the reservoir than they do now in traversing an equal portion of a sometimes not too friendly river. (R. 1314). Moreover, in getting adult fish upstream, trapping and hauling in tank truck to a hatchery or point above the dams for release is an acceptable substitute for ladders. (Ex. 25). The two State Directors state that it should result in no significant losses, and that the handling of upstream migrants is not a major problem, but that protecting downstream migrants has always proved an unsurmountable hazard at high dams.

The City's suggested downstream facilities include an extensive screening system, with stout close-mesh screens set at a slant to the flow of water, at the approaches (where the velocity of flow is low) to the intakes to the penstocks leading to the turbines, so as to shunt the downstream migrants away from the intakes and into controlled passageways leading into a collection chamber and through the dam and to safe discharge in the river below. (See Exhibit 14, Survey Report of Dr. Strunk and Dr. Hubbs).

The City's downstream facilities are based on certain observations and studies and known biological laws. The downstream migrants are composed mostly of the young fish or fiingerlings from about 1¼ to 6 inches in length, which remain in the streams for periods, depending on the species, of from a few months to two years after hatching, until compelled by a downstream urge to move to the ocean, there to stay and grow for the period of their cycle, and then return to their original streams to spawn and die. These fingerlings when so moved by such downstream urge largely yield themselves to the current of the stream and

float along helter-skelter, but generally with heads upsteram and tails downstream. When startled they alert themselves so oriented. They thus largely go where the current takes them, and should be shunted off the slanting screens and into the numerous entrance ports to the passageways leading to the collection chamber and through the dam. Mr. Hutchinson, of the U. S. Fish and Wildlife Service, testified to success with such screens at Little Port Walter in Alaska (R. 2425). The Secretary of the Interior, speaking for the U. S. Fish and Wildlife Service, in a letter report (Ex. 8) to the Commission with reference to these facilities said that they were "unique and evidenced considerable engineering ingenuity" and "are based on assumed biological laws, which may also be correct", and that "the Department cannot say that they will not work, since they had not been tried, but neither can it say that they will". He further commented that the plans "provide a unique engineering approach towards solution not only of the problems of the Cowlitz, but also for future conflict between fish and power" elsewhere.

A great portion of the testimony before the Commission was given over to these facilities and the other fisheries problems in the case. They are discussed in the supplement to the Applicant's Exceptions to the Examiner's Report and Recommended Order, pages 340 to 388 of the Record. Various questions raised in connection therewith are there answered under 26 different headings. Reference thereto may be had for further clarification.

The Commission was of the opinion that the City's proposed fish handling facilities were worthy of trial after further test and study in cooperation with the U. S. Fish and Wildlife Service and the State Departments of Fisheries and Game, and made provision therefor in the License, Article 30 and 31 thereof. (R. 559).

The Examiner's Recommended Decision

The Examiner's Recommended Decision (R. 58-149) may be briefly summarized as follows:

1. He finds that the proposed project meets admirably the tests of engineering feasibility, that there is no question but that the City can finance the project, and that there is a more than ready market for the energy output just as soon as it can be produced (R. 70-71).

2. He believes that the proposed facilities for handling migrating adult fish upstream will work with reasonable efficiency (R. 120-121).

3. He has unresolved doubts whether certain important features of the proposed facilities for handling migrating young fish downstream will work (R. 124, 134).

4. He concludes that development of the proposed project will conflict with the Lower Columbia River Fisheries Plan advanced by the U. S. Fish and Wildlife Service (R. 87-93).

5. He argues that various Federal agencies, including the Commission, Congress and the President, have approved and adopted the Fisheries plan (R. 93-106).

This is a key point in his buildup to his final conclusion.

6. He finds that, measured by a monetary yardstick, power, navigation and flood control benefits will greatly outweigh fisheries losses (perhaps as much as eight to one), but concludes that insofar as commercial and sports fishing is concerned a monetry yardstick is difficule to establish and should not be applied. He therefore adopts one of "better living". (R. 134-143).

This again is a key point in his build up to his final conclusion.

7. He reaches the overall ultimate conclusion that no permit for the project should be issued unless conclusive showing is made that there would be either "no deleterious effect" at all on fish resources, or only "relatively minor" effects, or the economic situation was such that power could not be obtained for the Pacific Northwest area by anyone from any other source but the Cowlitz River (R. 70, 106).

The Examiner's findings do not support his conclusions. He errs in his conclusion about official approval of the Fisheries Plan in item 5, in the yardstick he applies to fish values in item 6, and in his failure to apply a common standard of comparative values in item 7. Through his whole report runs the basic error that power, navigation and flood control benefits are to be measured by one yardstick (a monetary one), but commercial and sports fishing by another (better living, wholly intangible and immeasurable).

The Commission's Order

The Commission, after consideration of the Exceptions taken to the Examiner's Recommended Decision by the Applicant (R. 234-387), the Commission Staff (R. 388-437) the two State Departments (R. 438-456), and by the Attorney General for that segment of the public favoring the project (R. 225-232), and hearing oral argument by all parties, corrected the Examiner's errors above indicated. It pointed out that neither it nor the other government agencies or officials claimed had adopted or approved the Fisheries plan, and in the conclusion to its opinion summed up the situation as to the benefits and losses to be derived from the project as follows:

"We are required to consider all of the possible advantages and disadvantages of the City's proposal from the standpoint of the greatest public benefit through the use of these valuable water and other natural resources. The question posed does not appear to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important flood control benefits and navigation benefits, with incidental recreation and intangible benefits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization. With proper testing and experimentation by the City of Tacoma, in cooperation with interested State and Federal agencies, a fishery protective program can be evolved which will prevent undue loss of fishery values in relation to the other values. For this reason we are issuing the license with certain conditions which are set forth in our accompanying order."

The Issues Involved

Issues presented are:

1. Are the Petitioners "parties aggrieved" by the Commission's Order?

2. Are the challenged Findings of the Commission supported by substantial evidence?

3. Are the challenged Conclusions of the Commission correct?

Specifiically:

4. Has the City met the requirements of Section 9 (b) of the Federal Power Act by submitting to the Commission satisfactory evidence of compliance with State laws?

5. Are the provisions of Chapter 9, Laws of 1949, of Washington, superseded by the provisions of the Federal Power Act?

6. Are the provisions of said State act prohibiting construction of dams and diversion of waters invalid in part, and being inseparable, said act invalid in whole?

7. Is the subject of said State act, which purports to create a fish sanctuary and prohibit the construction of dams and diversion of water therein, expressed in the title of the act, which is "An Act relating to the protection of anadromous fish life in the rivers and streams tributary to the Lower Columbia River, and declaring an emergency", and does such State act embrace only one subject?

8. Does said act contain an unlawful delegation of legislative authority?

It is Intervener's position that the answers to questions 1 and 7 are No, and to all the other questions Yes, and that this review is not well taken.

SUMMARY OF ARGUMENT

The Federal Power Act was adopted by Congress in exercise of its public land and commerce clause powers, both of which are unlimited, except for the Fifth Amendment. *United States vs. California,* 328 U.S. 18, 91 L. Ed. 1889; *United States vs. Appalachian Electric Power Co.,* 311 U.S. 377, 85 L. Ed. 243.

By the Act Congress set up an all-embracing scheme for promoting and controlling the comprehensive development of the water resources of the nation, insofar as it was within the federal power to do so. It was most strongly desired to avoid any divided or dual authority over any one subject, and the solution reached was to apply the principles of division of constitutional powers between the state and

federal governments. Accordingly, to the states was left their traditional jurisdiction over property rights, and control over all other matters placed with the Commission as the Agent of Congress. *First Iowa Hydro Electric Coop. vs. Federal Power Commission,* 328 U.S. 152, 90 L. Ed. 1143.

The Federal Power Act supersedes all conflicting state laws providing for water power development of the streams under federal jurisdiction, as well as any other state laws in conflict therewith. The fact that these state laws may be enacted in exercise of the police powers is immaterial. The granted powers of Congress have never given way to the exercise of police powers by the states. The federal law is supreme.

Chapter 9, Laws of 1949, prohibiting the construction of dams over 25 feet in height, and the diversion of waters for any other than fisheries purposes, is in direct conflict with Section 10 (a) of the Federal Power Act, which authorizes and encourages such dams and other works when "best adapted" in "the judgment of the Commission" to a "comprehensive plan for improving" a "waterway" for the "benefit of interstate and foreign commerce", "water power development", and "other beneficial public uses". Here, compliance with the State act is impossible if effect is to be given to the Federal one, and proof of such compliance is unnecessary. It is not required by Section 9 (b) of the Act. *First Iowa Hydro Electric Coop. vs. Federal Power Commission,* 328 U.S. 152, 177, 90 L. Ed. 1143, 1157.

The situation is the same with reference to the necessity of obtaining a permit from the State Supervisor of Hydraulics. The provisions of the Federal law, as implemented by the License, are extensive and complete, and the State permit could contain nothing in conflict there-

with. To require it would be useless and in all probability unworkable.

The obtaining of approval of complete plans and specifications for fish handling facilities from the State Directors of Fisheries and Game, pursuant to Section 49, Chapter 112, Laws of 1949, as a prerequisite to the issuance of a Federal license is in like category. This statute merely requires such approval "before commencement of work", and it is not to be expected that such plans and specifiications would be prepared prior to obtaining a license. The Wildlife Resources Act of August 14, 1946 as well as Articles 30 and 31 of the License (R. 559) properly provide for final approval of the fish handling facilities by the Commission itself, after consultations with the U. S. Fish and Wildlife Service and the heads of the State Agencies. The City is not to manage the fisheries, but merely to furnish and pay for the fish facilities. Fisheries facilities were held a matter of proper consideration by the Commission in *Iowa vs. Federal Power Commission,* 178 F. (2d) 421, certiorari denied 94 L. Ed. 1383.

The Petitioners, while insisting that the City should obtain such a hydraulics permit, and approval of complete fishery plans and specifications, at the same time maintain that the State officials are without authority under Chapter 9, Laws of 1949, to issue such permit or aproval.

Section 313 (b) of the Act makes the findings of the Commission conclusive if supported by substantial evidence. Here they are supported by the great weight thereof. This appear from the facts set forth or referred to in our counter statement and elsewhere in our brief. Petitioners make no attempt to analize the evidence. They merely refer to items favorable to themselves and largely ignore the rest.

The provisions of Chapter 9, Laws of 1949, are fully superseded by the provisions of the Federal Power Act, and are invalid; and this is so even though the provisions of such act might have been deemed valid if directed only against municipalities. The provisions of the act being inseparable, and the act invalid in part, no longer expresses the legislative intent, or can accomplish its purpose, and is invalid in whole. *Corwin Investment Co. vs. White*, 166 Wash. 195, 6 P. (2d) 607; *Williams vs. Standard Oil Co.*, 298 U.S. 235, 73 L. Ed. 289.

The fact that the City is a subordinate body of the state, and has no privileges or immunities, and is entitled to no protection under the contract and due process and equal protection clauses of the Fourteenth Amendment, has no bearing here. The City makes no claim to any privileges or immunities or rights under said Amendment. The coincidence that the City is subordinate to the State does not change the fact that the Federal law, enacted under the commerce and public land clauses, is supreme, and is binding upon the state and all others alike. Chapter 9, Laws of 1949, never purported to be an act limiting the powers of municipalities. It makes no reference to municipalities or their powers.

Chapter 9, Laws of 1949, is also invalid under the provisions of Article II, Section 19, of the State Constitution, in that the subject thereof, which is the barring of construction of dams and diversion of waters, is not expressed in the title, which relates only "to the protection of anadromous fish life".

Chapter 9, Laws of 1949, is also invalid under Article II, Section 1, of the State Constitution, in that it contains an unlawful delegation of legislative authority.

Finally, the Petitioner Washington State Sportsmen's Council is clearly not a "party aggrieved" by the Commission's Order and neither are the two State Departments.

ARGUMENT AS TO PARTIES AGGRIEVED

The Petitioners are not Parties Aggrieved by the Commission's Order

As pointed out above, the State of Washington is not a party to this proceeding. Its departments and officials through the Attorney General, were on both sides of the controversy before the Commission.

Section 313 of the Act (16 USCA 825 l) specifies who may seek rehearing and review of a Commission Order. It provides (subsection a) that "any person, State, municipality, or State Commission aggrieved by an Order" may apply for rehearing, and confines the right of review to those making such application. This must be construed as confined to those *entitled* to make such application. Each of the foregoing designations are specifically defined in the Act. Section 3 thereof (16 USCA 796). These definitions are:

> "(4) 'person' means an individual or a corporation;"
>
> "(6) 'State' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;"
>
> "(7) 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;"
>
> "(15) 'State commission' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;"

The two State Departments are not the "State". No one or two departments or officials can be that. They can

be, as here, on different sides of the controversy. They are not "persons". They are not "municipalities". That term is limited to designated bodies with a particular function. Neither are they a "State commission". That term is confined to the public service rate regulatory body.

The Wildlife Resources Act of August 14, 1946 (16 USCA 662) specifies the method by which the heads of the State agencies dealing with wild life resources are to submit their views for the prevention of loss and damage to such resources. This indicates that Congress placed the decision on these questions in the Commission, with the State agencies as mere advisors, and that it did not elevate them to the category of parties or possible contestants. Further, the time for final determination and approval of fish handling facilities has not yet come, and these state agencies are to be continually consulted with reference thereto. See License, Article 30 (R. 559). It may well be that the recommendations of the two Departments, short of an arbitrary refusal to approve anything, will be incorporated in the final fish handling plans and specifications.

In both the *First Iowa* case, and in *Iowa vs. Federal Power Commission,* 178 F. (2d) 421, the party seeking review was the State.

Petitioner Sportsmen's Council is a non-profit organization of resident of Washington "dedicated to the preservation and protection of the resources of the State of Washington and their recreational value". It has no statutory or official function and its members have no more interest in the resources of the State than its citizens generally. It is very definitely not a "party aggrieved" by the Commission's Order. *In re Borough of North Braddock,* 190 Atl. 357, 361; *Interstate Electric, Inc. vs. Federal Power Commission,* 154 F. (2d) 495.

ARGUMENT

For convenience, where applicable, we will follow the same subject-matter arrangement as Petitioners, with such change of headings as better expresses our position.

A.

The Commission had full Jurisdiction and Authority to enter its order issuing the License to the City.

Specifications of error 1 through 5 are discussed hereunder.

1. The City is not required to comply with those state laws relating to water power development which have been superseded by the Federal Power Act, or are invalid.

It is true that the State, as trustee for its people, is the owner of the fish in the streams and tidewaters within its boundaries, so far as fish are capable of ownership while running; and that it may regulate and control their taking and killing. But this title and these rights are subject to the paramount rights to regulate navigation, interstate and foreign commerce and public lands, granted to the central government. *State vs. Towessnute,* 89 Wash. 479, 154 Pac. 805; *McCready vs. Virginia,* 94 U.S. 291, 24 L. Ed. 298.

Such ownership of the fish does not carry with it the ownership of and the right to control the use of the waters in which they subsist. The Federal Government has complete control and domination over the water power inherent in flowing streams, and is liable to no one for its use or non-use. *United States vs. Appalachian Electric Power Co.,* 301 U.S. 377, 85 L. Ed. 243, 261.

The State no more owns or has dominion over the waters, than the Federal government owns or has dominion over the fish. But when the State's attempt by law to regu-

late or control its fish collides with the Federal government's attempt by law to regulate or control its commerce the supremacy of Federal law must prevail. That is what the provisions of both the Federal and State Constitutions provide. Federal, Article VI; State, Article 1, Section 2.

The passage of the State statutes set forth by Petitioners, pages 32 to 37, cannot be denied, but their applicability and effectiveness can. For the City to proceed is not to disregard these laws, because when they are superseded and invalid they are not laws. Rather, that which supersedes them is the law. These superseded laws declare no policy, and to ignore them is to obey the law, not to defy or disregard it.

2. The fact that the statutes of the State, with which the Petitioners claim the City has not complied, were passed under the State police powers, does not make them valid or applicable.

It is true that the State of Washington has been historically concerned with the preservation of its fish and game, and perhaps not sufficiently. It has also been historically interested in the development of the water power resources within its borders. There is no basis, however, for the statement, which Petitioners make on page 40 of their brief, that the preserving inviolate of the spawning grounds of anadromous fish has been "foremost" in the minds of our legislators from the earliest territorial days.

Petitioners state (p. 40) that the "Sanctuary Act" does not purport to deal in a contradictory manner with anything expressed or reasonably implied in the Federal Constitution or any law passed pursuant thereto, and that at best the "Sanctuary Act" is merely in derogation of the *ruling* of the Federal Power Commission. By this we assume they mean the Order of the Commission issuing the License. This Order is a legislative act, issued by the Com-

mission as the designated and authorized agent of Congress. In the recent decision of the United States Supreme Court in *United States vs. Federal Power Commission,* Nos. 28 and 29 October Term 1952, decided March 16, 1953, the Court on page 14 of the decision refers to the "general grant of continuing authority to the Federal Power Commission to act as the responsible agent in exercising the licensing power of Congress" and, after citing *First Iowa* case with reference to the need for and breadth of power granted to the Commission, further says:

> "And so, in 1930, the Commission was reorganized as an expert body of five full-time commissioners. 46 Stat. 797, 16 USC Sec. 792. These enactments expressed general policies and granted broad administrative and investigative power, making the Commission the permanent disinterested expert agency of Congress to carry out these policies. Cf. 41 Stat. 1065, as amended, 49 Stat. 839, 16 USC Sec. 797; 3 Rep. Pres. Water Resources Policy Comm'n 501 (1950)."

It was an order of the Commission and conflicting statutes of Iowa that were involved in the *First Iowa case* and in *Iowa vs. Federal Power Commission,* 178 F. (2d) 421. The latter also involved the adequacy of provisions concerning fish handling facilities.

Petitioners state (p. 40) that the City has no right as a person under the Federal Constitution, it being merely a creature of the state and dependent entirely upon the will of the legislature. The City claims no privileges and immunities or protection here as a person under the Fourteenth Amendment, but it does claim that the Federal Constitution and the law enacted pursuant thereto are the supreme law of the land, made so by both the Federal and State Constitutions, and binding upon the State as well as

their subordinate bodies and all others. Further, in dealing with subordinate bodies the legislature must do so by appropriate legislative act, and in accordance with the provisions of the State Constitution. We shall further discuss this matter under the subheadings of A 4 hereof.

Petitioners urge (pp. 41-48) that the passage of Chapter 9, Laws of 1949, was an exercise of the police power of the State, and cite *State vs. Towessnute,* 89 Wash. 479, 154 Pac. 805; *State ex rel Campbell vs. Case,* 182 Wash. 334, 47 P. (2d) 24, and other Washington cases, and *McCready vs. Virginia,* 94 U.S. 291, 24 L. Ed. 298, and other federal cases to sustain their positions. There can be no doubt but that the State's authority to regulate and control its fish is an exercise of the police power. Its authority to do most things, as those relating to health, safety, morals, public convenience, general prosperity and welfare, is in the same category. *State vs. Pitney,* 79 Wash. 600, 611, 140 Pac. 918. It does not follow that a state law so passed takes precedence over the conflicting provisions of the Federal Power Act, or that it remains unaffected thereby. In the *Towessnute* case the Washington Court, referring to the police power to regulate fish, says:

> "It must be exerted, to be sure, in such manner as will not infringe other rights which the states, by the constitution, gave up to the central authority;"

Also in *McCready vs. Virginia,* 94 U.S. 291, 24 L. Ed. 298, the Court, referring to the State's ownership of fish, says:

> "The title thus held is subject to the paramount right of navigation, the regulation of which with respect to inter-state or foreign commerce, has been granted to the United States."

See also *Foster-Fountain Packing Co., vs. Haydel,* 278 U.S. 1, 73 L. Ed. 147.

In none of the State or Federal cases cited by Petitioners was there a conflict between State and Federal statutes, and in none did a Federal statute yield to a State one, police powers or no police powers.

Petitioners urge (pp. 44-45) that the power to regulate fisheries was not among those granted to the Federal Government, but was reserved exclusively for exercise by the states, and cite *McCready vs. Virginia*, 94 U.S. 291, 24 L. Ed. 298, and *Davis vs. Olson*, 128 Wash. 393, 222 Pac. 891, in support of their position.

Conceding that the power to regulate fisheries was not granted to the Federal government, and that an act of Congress having as its sole purpose such regulation would be invalid, it does not follow that Congress, in exercising its war or commerce or other granted powers, may not legislate in such manner as to affect fish, and to affect them seriously. To permit the exercise of the nation's legitimate powers to prevail over the exercise of the State's legitimate powers is the very purpose of the supremacy clauses of both the State and Federal Constitutions. *Gibbons vs. Ogden*, 9 Wheat. 1, 6 L. Ed. 23.

In *Davis vs. Olson, supra,* the Washington Supreme Court expressly says that "the Federal government may prohibit or give its assent to the maintenance of fixed structures in navigable waters." Give its assent is what it has done here. The Court continues, "but it does not assume to give any right to take fish". It has not done so, nor purported to do so, here, in any ordinary sense or usage of the word "take".

Petitioners cite *Holyoke Water Power Co. vs. Lyman*, 82 U.S. 500, 21 L. Ed. 133, and other cases, as sustaining the proposition that one obstructing the waters of a stream is under obligation to provide fishways therefor. The City

does not deny this, and has continually expressed its willingness to provide such facilities. The question remains, what facilities, and finally approved by whom? It may well be in the present case that when the complete plans and specifications for fish facilities are finally worked out and installed, they will be those approved by both the U. S. Fish and Wildlife Service and the heads of the State Agencies. The point now involved is not so much final approval, as it is threatened outright denial. That Congress under the Federal Power Act intended the Commission to deal with and have final say over the kind and extent of fish facilities installed, along with the other features of the water power development, seems to us obvious. It had dealt with fish at dams in many projects over a long period of time, had made appropriations for their aid, and had its own fisheries and wildlife agency, and certainly knew that fish would be involved in water power development. The Wildlife Resources Act of March 10, 1934, (16 USCA 661 et seq.) shows its cognizance of the subject.

The suggestion that the State could by legislative act appropriate all the waters of a river system within its border to exclusive use for fisheries purposes, is simply another way of claiming that the Federal law is not supreme. If the State could do this, it could similarly appropriate such waters for any other purpose within its broad police powers, and development of our water resources, even by the Government itself, would be defeated.

Petitioners refer (p. 45) to Section 27 (the savings clause) of the Federal Power Act. We shall discuss this section under the next heading herein.

3. The State Statutes in Question are Superseded by the Federal Power Act, and do not Affect the Commission's Authority to Issue a License to the City.

What we have already said bears fully upon this question. We think Petitioner's position is completely answered by the decision of the United States Supreme Court in *First Iowa Hydro Electric Coop. vs. Federal Power Commission,* 328 U.S. 152, 90 L. Ed. 1143. We rely fully thereon and on the excellent reasoning therein contained.

Petitioners cite (pp. 48-51) several sections and parts of sections of the Federal Power Act as supporting their contention that the act expressly withholds authority from the Commission over the State's fisheries resources. Sections 9(b) and 27 of the Act are discussed at length in the *First Iowa* case and are covered herein. The other sections and provisions noted are not of particular importance here. Sections 201 and 202 are contained in Part II of the Act, and deal solely with the regulation of interstate transmission and sale of electric energy. They are intended to supplement intrastate regulation or rates and service by the State, and have no bearing whatever on the construction of water power projects.

Section 9 (16 USCA 802) specified the information which an applicant shall submit to the Commission. It contains three subdivisions. The opening clause and subdivision (b) reads:

> "Each applicant for a license under this chapter shall submit to the commission—
>
> * * *
>
> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to

the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter."

The state laws mentioned are only those "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes" and to engage in the power business.

The evidence as to compliance with state laws is to be such as is "satisfactory" to the Commission. This it may be, either by a showing of actual compliance, or the supersedure and inapplicability of state laws ,or a showing that their applicable provisions will be met in due course. A case in point would be acquisition of property rights, which would necessarily largely follow the granting of the License. By Section 21 it is the "licensee" that is granted the right of eminent domain. In the *First Iowa* case, where statutes of Iowa somewhat similar to those in question here were involved, the Court, at page 1148, said that Section 9(b) *does not require a compliance with any state law.*

Section 27 (16 USCA 821) contains the "savings" clause of the Act. It evidences the recognition by Congress of the need for such a clause if the usual rules of supersedure are to be avoided. It also evidences the limits placed upon the state laws saved. The section reads:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, apropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

The laws saved are those "relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein". The plan and provisions of the whole act demonstrate that by this are meant laws relating to property rights. The Supreme Court, commenting on the effect of the Act upon related State statutes, in the *First Iowa* case said at page 1153:

> "We find that when that Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation and a determination to avoid unconstitutional invasion of the jurisdiction of the states. *The solution reached is to apply the principle of the division of constitutional powers between the state and Federal Governments.* This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter.
>
> "The Act leaves to the states their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. *These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States.*" (Italics ours).

There is thus to be no duality, and the emphasized sentences indicate the line of division between the subjects assigned to the states and those assigned to the nation. It is exactly along the line of division of constitutional powers, and as far as Congress can go in assertion of its authority, without infringing on that of the state, Congress has gone.

Representative Wm. L. LaFollette, a member of the Special Committee on Water Power, which reported the bill which became the Act, speaking of Section 9(b), said:

> "'*The property rights are within the State.* It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision *(United States v. Cress,* 243 U.S. 316, 61 L. Ed. 746, 37 S. Ct. 380), *as to the property rights of the States* as to the bed and the banks *and to the diversion of the water,* then it is sure that we have not infringed any of the rights of the States in that respect, *or any of their rules of property,* and *we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development.* We are earnestly trying not to infringe the rights of the States. If possible we want a bill that cannot be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States." (56 Cong Rec. 9810). (Italics ours).

The Supreme Court, commenting on Representative LaFollette's statement, said at page 1155:

> "As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so far as to bring about the needed development of water power and *also with the recognition of the constitutional rights of the states so as to sustain the validity of the Act.* The resulting integration of the respective jurisdictions of the state and Federal Governments, is illustrated by the careful preservation of the separate interests of the states through the Act, without setting up a divided authority over any one subject.
>
> "Sections 27 and 9 are especially significant in this regard. Section 27 expressly 'saves' certain state laws

relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act." (Italics supplied)

The Supreme Court, speaking further as to the effect of Section 27, says at page 1156:

"The effect of Sec. 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. *It therefore has primary, if not exclusive, reference to such proprietary rights.* The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses'. Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." (Italics ours)

If Section 27 had any broader saving effect than indicated by the Supreme Court in the *First Iowa* case, the whole purpose and intent of Congress in passing the Federal Power Act would be defeated. It certainly was not the intent to save to the states their legislation on the very matters Congress was legislating about, and to permit the states, if they so chose, to pass legislation restricting the use of the very waters which were the subject matter of the Act. The granting to the Licensee of the right of eminent domain indicates that Congress intended that the licensee should be able to acquire all the property and other rights necessary for the project, including vested rights to appropriate, divert and use waters. It could not have been reasonably intended that the taking of water for use by a few persons for irrigation purposes, or by a small community for municipal purposes in the path of a huge project, should block such a project. It was merely meant that these vested property rights should be pro-

tected and proper compensation made therefor. Any other interpretation of the Act would render it unworkable and defeat its purpose.

Petitioners cite (pp. 53-56) the cases *Ford & Sons vs. Little Falls Fibre Co.,* 280 U.S. 369, 74 L. Ed. 489; *Grand River Dam Authority vs. Grand-Hydro,* 335 U.S. 359, 93 L. Ed. 64, and *United States vs. Gerlach Live Stock Co.,* 339 U.S. 725, 94 L. Ed. 1231. Each of these cases dealt with property rights, and the recovery of compensation therefor. The same is true of the cases of *United States vs. Cress,* 243 U.S. 316, 61 L. Ed. 746, and *Niagara-Mohawk Power Corp. vs. Federal Power Commission,* (CA DC No. 10862), decided December 31, 1952, cited respectively on pages 65 and 67 of Petitioners' brief. The first case is the one referred to by Representative LaFollette in the *First Iowa* case as relating to property rights. In the second case the Court specifically points out that Congress "was taking care not to impinge upon the rights of the states or upon their rules of property concerning diversion of water". A diversion of waters, as distinguished from the property rights therein, was involved in the *First Iowa* case.

The case of *State ex rel Washington Water Power Company vs. Superior Court,* 34 Wn. (2d) 196, 208 P. (2d) 849, cited on page 57, merely held that the Commission's outhority to regulate rates and charges of Licensees in accordance with the express terms of the Act extended only to licensees who were public service companies. It involved no question of conflict between state and federal laws, but only one of interpretation of the federal law itself.

Petitioners state (p. 58) that "the purpose and nature" of the state statutes involved here are "entirely different" from those involved in the *First Iowa* case. The Washington statutes, they say, "set forth a state policy in respect to

diversion of water and the protection of fishery resources". Examination of Sec. 7771, Chapter 363, Code of Iowa, 1939, involved in the *First Iowa* case, discloses that that section reads:

> "7771. When permit granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and *any water taken from the stream in connection with the project is returned thereto at the nearest practicable place* without being materially diminished in quantity *or polluted or rendered deleterious to fish life,* it shall grant the permit, upon such terms and conditions as it may prescribe." (Italics supplied).

We assume that Petitioners must have overlooked the wording of this statute. The Court in commenting on the provision against diversion, said at page 1150:

> "This strikes at the heart of the present project. The feature of the project which especially commended it to the Federal Power Commission was its diversion of substantially all of the waters of the Cedar River near Moscow, to the Mississippi River near Muscatine. Such a diversion long has been recognized as an engineering possibility and as constituting the largest power development foreseeable on either the Cedar or Iowa Rivers."

Since the state laws saved by Section 27 are those which have "primary, if not exclusive, reference to such proprietary rights," the principles of *ejusdem generis* discussed from pages 61 to 66 of Petitioners' brief are not particularly important here. As long as the saved laws are those relating to property rights, it does not much matter what kind of property. We very much doubt, however, that when Congress chose the words "irrigation" and "munici-

pal" to characterize the kind of uses of water it had in mind, it surmised that it might be later urged that the words "other uses", used in connection therewith, included the common and customary use of the water by the fish therein.

Petitioners carry the above phase of their argument to the extent that they arrive (p. 65) at the conclusion that since the use of water to develop power is a recognized municipal use, any state act relating to power is exempt from the provisions of the Federal Power Act. This is completely counter to the goal of Congress as so clearly stated in the *First Iowa* case.

In discussing the principals of *ejusdem generis,* Petitioners quote *Alabama Power Co. vs. Gulf Power Co.,* 203 Fed. 606, 619, as construing Sections 27 of the Act to include laws relating to the rights of riparian owners with respect to the formation of ice on streams, the construction of wharfs, piers and docks, and the right to shoot wild water fowl from boats. Surely it is only property rights in connection therewith that are saved.

Petitioners state (p. 66) that the "Respondent has not shown, nor could it show, that there are no other sources of power which would supply that expected to be produced by the Cowlitz dams". Such proof is not required by the Act on the part of any applicant. Applicant has shown that its proposed project is the "best adapted" use of the waters of the river, and that there is no other comparable site within its reasonable proximity. To require an applicant to do more would result in each application in turn being denied because there was another site, and the applicant perhaps finally being told that it should forget about water power and build a steam plant.

The Petitioners refer (pp. 66-67) to the Federal Power Commission and the City as *taking* the State's property. The

Commission's Order does not provide for the taking of any property, or even any fish, and the City is and will take none. The Order merely grants a license to the City to use the waters of the river in the future for power development. The State's "property right" in the fish while at large does not extend to or exclude this future use of waters for power purposes. As to this use or non-use the Federal government is answerable to no one. *United States vs. Appalachian Electric Power Co.,* 311 U.S. 377, 424, 85 L. Ed. 243, 261.

4. The City has claimed No Unauthorized Rights, has Proceeded in Accordance With Applicable Laws, and is a Proper Licensee Under the Federal Power Act.

a. *Chapter 9, Laws of 1949, is superseded and invalid in toto.*

Petitioners' argument under the corresponding subheading of their brief is to the effect that even if Chapter 9, Laws of 1949, is superseded and invalid as to private persons and corporations and cooperative associations and the government itself under the *First Iowa* case, it is still valid as to the City and other municipalities of the State.

In support of their position Petitioners, from pages 69 to 74, cite cases to the effect that municipal corporations are subordinate bodies or creatures of the state, that they derive their powers solely from th State Constitution and statutes, that powers once delegated to them may be taken away at will ,and that they have no privileges and immunities under the Federal Constitution.

We agree that the City is a subordinate body of the state, that along with towns, counties, school districts, port districts, public utilities districts and other bodies, it has been referred to as a creature of the state, that it derives its existence, powers and privileges from the state, and that

the legislature by appropriate act can take away its powers and privileges, and subject to certain limitations even snuff out its existence. *But just because the legislature has an undoubted right to legislate upon a particular matter or to do a particular thing, does not mean that it has done so or even attempted to do so, or that such act as it did pass was intended for that purpose or is a valid enactment.*

The question here is not one of the City's *right* or *privilege* to preceed in derogation of State laws, or to flaunt the authority of its sovereign, or to defy its creator; but rather, merely, what is the valid and applicable law? If Chapter 9, Laws of 1949, is superseded and unconstitutional upon any of the grounds urged, it is no law at all, and to contest its attempted enforcement by state officials under color of office constitutes no defiance. Neither is it a matter of ignoring state policy. The state can have no policy counter to the nation's in the field of Federal supremacy. Compare *Christy vs. Port of Olympia,* 27 Wn. (2d) 534, 550, 179 P. (2d) 274. An invalid law is no policy. It is the very essence of lawlessness.

The authorities cited by Petitioners, pages 72 to 74, to the effect that subordinate bodies of the State have no privilege and immunities and are entitled to no protection under the equal protection and due process and contract causes of the Federal Constitution, all concern and are limited to interpretation of the first section of the Fourteenth Amendment to the Federal Constitution, the provisions of which are designed to protect *citizens* against *State* action. Since municipalities are a part of the State, the State can have no inviolate contracts with them, and they are not "citizens" under the Fourteenth Amendment. This principle is expressed in *Paine vs. Port of Seattle,* 70 Wash. 294, 126 Pac. 628, where the Court said:

"The general rule is that municipal corporations—the 'taxing districts' here involved—are creatures of, and subject to the regulation of, the legislature, and it seems clear that the Fourteenth Amendment was not intended to affect that principle."

The fact that the Fourteenth Amendment does not apply as between the State and its subordinate bodies does not mean that the other provisions of the Federal Constitution do not govern and control them. The contrary is true. These other provisions of necessity are effective and supreme everywhere, and this supremacy is not a limited one. If the Federal Government is legislating within its granted powers, its acts do and must supersede and invalidate all contrary provisions of any state law. They are as much the law of the land as if enacted in each state separately. We may thus here assume that the Federal Power Act is in effect a state act, and the conflicting and superseded act a nullity.

See *In re Stixrud's Estate,* 58 Wash. 339, 342, 109 Pac. 343; *Federal Land Bank vs. Statelen,* 191 Wash. 155, 158, 70 P. (2d) 1053; *Sound View Pulp Co. vs. Taylor,* 21 Wn. (2d) 261, 274, 150 P. (2d) 839;*Gilvary vs. Cuyahoga Valley R. Co.,* 292 U.S. 57, 78 L. Ed. 1123, 1126.

In *Gibbons vs. Ogden,* 9 Wheat. 1, 6 L. Ed. 23, Justice Marshall said at page 209:

"The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of congress, made in pursuance

of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

Again in *United States vs. California,* 332 U.S. 19, 91 L. Ed. 1889, 1893, which involved offshore lands, the Court said:

> "We have said that the constitutional power of Congress in this respect is without limitation. United States v. San Francisco, 310 U.S. 16, 29, 30, 84 L. Ed. 1050, 1059, 1060, 60 S. Ct. 749. Thus neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power."

The State above all others should comply with Federal law constitutionally enacted. Conversely stated, it cannot lawfully violate the same, either directly or indirectly, by itself or through direction to its subordinates. Municipal ordinances must conform to state laws, and state laws in turn must conform to federal law, which is expressly made binding on all state judges.

b. *Chaper 9, Laws of 1949, being invalid in part, is invalid in whole.*

As preliminary to this discussion we ask these questions; Assuming the provisions of Chapter 9, Laws of 1949, are invalid and inapplicable as to private persons and corporations and cooperative associations and the Federal government under the *First Iowa* case, can they be valid and applicable as to municipalities? Assuming that the legislature could, had it elected so to do, have passed an act confined to municipalities and expressly prohibiting them from constructing any dam or making any diversion, can the act *as actually written* be construed as if it was

so written? Can the invalid provisions and their application to the first group be separated constitutionally from the same provisions and their application to the second group, and the Act in its newly construed form still stand as an expression of legislative intention?

The answer to these questions lies in the principles of statutory construction relating to *separability*. For an excellently concise discussion thereof see *Sutherland Statutory Construction (3rd Ed.) Chapter 24*. There are a number of these principles that are of great aid in construction.

The general rule was well stated by the Washington Court in *Corwin Investment Co. vs. White,* 166 Wash. 195; 6 P. (2d) 607. The Court said at page 198:

> "The rule is that the entire act will fail where the constitutional and unconstitutional provisions are so connected and interdependent in subject matter, meaning and purpose that it cannot be believed that the legislature would have passed the one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish any of the purposes of the legislature. *State v. Powles & Co.,* 90 Wash. 112, 155 Pac. 775; *Northern Cedar Co. v. French,* 131 Wash. 394, 230 Pac. 837.

In *Williams vs. Standard Oil Co.,* 298 U.S. 235, 73 L. Ed. 289, the Court at page 309 similarly states the general rules applicable to questions of separability:

> "But the general rule is that the unabjectionable part of a statute cannot be held separable unless it appears that, 'standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fail'. The question is one of interpretation and legislative intent, * * *

> " 'In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process.' " (Italics ours)

Certainly elimination of the invalid provisions here would not leave the features and purposes of the act "substantially unaffected" by the process. It is difficult to believe that the legislature would have created the sanctuary *applicable only to municipal projects.* It would then, in fact, have no longer created an effective sanctuary.

In *Northern Cedar Co. vs. French,* 313 Wash. 394, 230 Pac. 837, the act under inquiry was one regulating commission merchants. Section 8 authorized the Director of Licenses to forfeit a commission merchant's license, but made no provision for notice or hearing. The court held this section invalid, but sustained the remaining provisions because the act carried a separability clause. It said at page 415:

> "Ordinarily, we would be disposed to say that the legislature would not have passed this act without some provision for the cancellation of licenses. But the last section expresses the legislative intent when it says that if any section or part of a section of this act shall, for any cause, be held unconstitutional, such holding shall not affect the rest of this act or any section thereof'. By this provision the legislature has expressely overcome the presumption that we would ordinarily draw that the act would not have been passed but for some provision for the annulment of licenses."

Chapter 9, Laws of 1949, contains no separability clause, and its provisions seem hardly capable of division,

or divisible in application, if the objectives of the act are to be preserved.

Even presence of a separability clause will not save the remaining provisions of an act where elimination of an invalid provision will materially alter or change the tenor of the act, and make it operate or apply in a manner never contemplated. *State vs. Inland Empire Refineries,* 3 Wn. (2d) 651, 101 P. (2d) 975; *Jensen vs. Henneford,* 185 Wash. 209, 53 Pac. (2d) 607.

The legislature is not presumed to intend to pass a partially invalid act, nor an unreasonable one. The intent of the legislature is to be found in the act itself. It must appear therefrom that the legislature intended to deal with the saved portion of the original subject matter regardless of the validity of the remainder. *Sutherland Stat. Const. (3rd Ed.) Sec. 2403.*

With the foregoing general principles in mind let us examine the language of Chapter 9 to see what it indicates. This language is general and sweeping in phraseology. It creates a single sanctuary embracing an extensive portion of the State's largest river system. This sanctuary is "against undue industrial encroachment". It does not say "by municipalities". It does not mention municipalities or suggest that it is dealing therewith in any way differently than with anyone or anything else. The limitation is against construction of *any* dam over 25 feet in height. "Waters" are not to be diverted for *any* purpose other than fisheries. The right of eminent domain is granted to acquire *any* water right that may have become vested, and to abate *any* dam or other obstruction. These are words of all inclusive meaning. It is not to be presumed that the legislature would have passed the act with the word "some" substituted.

Another pertinent inquiry is whether the terms of the act are such as to warrant a belief that the legislature would have passed the act without the invalid parts, and with its limited application. It would in that case have only created a sanctuary against municipal power development, while leaving private and governmental power untouched. It would have permitted private dam construction and diversion of waters, but not public.

Another pertinent inquiry is the importance of the invalid features. Would their absence materially change or alter the act, or largely defeat the accomplishment of its purposes? Such a result, we submit, would inescapably follow here. Dams constructed and diversions made by private operators or cooperatives, or the Federal Government, would have exactly the same effect on fish as if constructed or made by a municipality. And since the number of possible dam sites in the area is limited, in the end the same total number of dams would be constructed and diversions made, and result in the same total number of industrial encroachments. The only difference would be that the dams would be differently owned and, incidentally, less subject to direct legislative control. Even in the case of a project such as the one at bar, the partially valid act would not succeed, except temporarily, in blocking the project. The City could presumably assign its license, or such rights as it has, to a private operator or cooperative association, and they could proceed, or a new license could be granted upon application by new qualified parties.

We have here a situation where the entire state act is invalid in the major part of its application, and where, in its altered form, it would operate differently than the legislature intendeded, and falter and fail wholly in its

purpose. Under the principles of statutory construction above stated it is clearly invalid and unconstitutional in its entirety. It thus makes no difference that a part of the provisions of the Act might be deemed valid and enforceable if separately enacted. Here the invalid provisions are so essentially a part of the whole act that without them it cannot stand.

All of the above does not mean that the State could not prohibit its municipalities from engaging in any phase of the power business if it saw fit so to do by proper act passed for that purpose. It could take the municipalities out of the power generating business entirely, or even out of the whole of the utility business. This, however, it has not done, nor purported to do, and is an entirely different subject and would, of course, call for a wholly different act and an entirely different determination of policy than that which was involved in the passage of Chapter 9, Laws of 1949.

We have undertaken to show the *inseparability* of the provisions and application of Chapter 9. The burden is really on the Petitioners to show the opposite—their *separability*. The rule in this respect is well stated in *Carter vs. Carter Coal Co.*, 298 U.S. 238, 80 L. Ed. 1160.

The City has a clear right to attack the constitutionality of the Act in question, even if the provisions of the act be assumed to be valid when applied directly to it. In *Rottschaefer on Constitutional Law, page 29*, it is said in this respect:

> "The general rule that denies a person the right to question the constitutionality of an act in respect of its enforcement against others is inapplicable in some situations. The unconstitutionality of a part of a statute sometimes renders the remainder thereof

> legally inoperative. The persons affected by the remainder are permitted to question the constitutionality of the invalid part even though it does not apply to them, since that is an essential element in establishing that the remainder is legally inoperative as to them."

The above quotation is set forth and adopted and applied in the recent Washington case of *In re Hendrickson*, 12 Wn. (2d) 600, 608, 123 P. (2d) 322. See also: *McFarland vs. City of Cheyenne,* 48 Wyo. 86, 42 Pac. (2d) 413; *Gretna vs. Bailey,* 141 La. 625, 75 So. 491; *United States vs. Reese,* 92 U.S. 214, 23 L. Ed. 563.

The right of a subordinate body to contest with the State is neither new nor infrequently exercised. There is no other way for them to assert their constitutional and statutory rights when state officials interfere or adversely interpret.

The municipalities and other subordinate bodies of the State can and frequently do engage in litigation with the State and also with officers thereof who may, as here, be merely acting under color of office under an unconstitutional act. In such cases the action is not really one between the State and its subordinate bodies, but between the subordinate bodies and such state officials acting in their individual capacity.

In *State ex rel Robinson vs. Superior Court,* 182 Wash. 277, 46 Pac. (2d) 1046, the Court said in this respect at page 280:

> "It is now settled beyond question that a suit against State officers in which an attack is made against the constitutionality of a State statute is not a suit against the State."

To the same effect are: *State ex rel Shoemaker vs. Superior Court,* 193 Wash. 465, 76 Pac. (2d) 306; *Wiegardt vs. Brennan,* 192 Wash. 529, 73 Pac. (2d) 1330; *State ex rel. Fleming vs. Cohn,* 12 Wn. (2d) 415, 121 Pac. (2d) 954; *Ex parte Young,* 209 U.S. 123, 52 L. Ed. 714.

If Chapter 9, Laws of 1949, is superseded and unconstitutional, then the State Directors are here under color of office and merely as individuals. The City's right to challenge the act in the end depends on the effectiveness of the act itself. If it is invalid, the City has a right to so assent.

c. *The Subject of Chapter 9, Laws of 1949, is not Expressed in the Title, and the Act Embraces More Than One Subject, and is Unconstitutional on This Ground.*

The title to the act is "An Act relating to the *protection of anadromous fish life* in the rivers and streams tributary to the lower Columbia River and declaring an emergency" (Emphasis supplied).

The latter portion of the title merely indicates the location where the act is intended to apply. It adds nothing to the sufficiency of the title. The *subject* of the act is confined to, and must be found solely in, the clause "protection of anadromous fish life". The challenge to the title is as to its *narrowness.*

It is our position that the foregoing title fails to meet the requirements of Article II, Section 19, of the State Constitution, which reads:

> "No bill shall embrace more than one subject, and that shall be expressed in the title."

It is submitted that the pharse "protection of anadromous fish life" is not sufficiently broad to indicate that what is to be found in the body of the act is provisions setting up

as a sanctuary the vast river system mentioned, and prohibiting hydro-electric power and industrial development thereon. There is neither hint nor suggestion in the title that any such sanctuary is to be created, or that hydro-electric dams or industries are to be limited or prohibited, or that if any exist, they are to be acquired and destroyed. No mention whatever is made in the title of reserves, or sanctuaries, or dams, or industries, or existing structures, or water rights, or of their acquisition and abatement, or purchase or condemnation.

The body of the act legislates far beyond the scope of the title. The Petitioners have even sought to construe the act as one limiting or withdrawing the powers of municipalities. Yet there is no reference in either the title or the body of the act to municipalities or their powers, and clearly the act, if applicable *at* all, was intended to be applicable *to* all, private individuals and companies and cooperative associations and municipalities alike.

The title of the act represents that the act relates to the "protection of anadromous fish life". Not all fish life, but "anadromous" fish life only. Further, the key word is "protection". What would one, seeing it used in connection with anadromous fish life, think? Would there come to his mind the possible barring of badly needed major hydro-electric power projects on the whole river system, and the prohibition of possible future hugh industrial developments requiring the use of higher than 25-foot dams? Would there arise in his mind the thought of the State's acquiring for the purpose of destruction existing water rights, or of its abating or condemning and destroying existing structures? Would he understand the title as heading an act which if passed would in effect limit or prohibit public power developments while leaving private

undertakings untouched? Would he see the pending bill, in effect but without saying so, as one limiting or withdrawing powers previously granted to cities, towns and public utility districts? We think that the obvious answer to each of these questions is that the title of the act gives no such warning, and clearly demonstrates the insufficiency thereof. It is distinctly not a vehicle of notice. *Shea vs. Olson,* 185 Wash. 143, 152; 53 Pac. (2d) 615.

The word "protect" as defined, and as ordinarily used and understood, means to cover, to defend, to guard, to shelter, to shield, to keep free from danger. "Protection" is the noun of the term. (See 34 Words & Phrases 642). It hardly connotes steps as drastic and far reaching and costly as those attempted to be authorized and permitted here. When such steps are intended, better words of warning of the contents of the act should be used.

Broad titles, embracing many related matters, are sustained. *Marston vs. Humes,* 3 Wash. 267, 28 Pac. 520. But the fact that a title broad enough to bundle the contents of an act under one subject *could have been written,* does not correct the situation, such as that here, *where it was not.* Cases sustaining broad titles are largely not in point here.

We shall confine ourselves to citing Washington cases.

In *Anderson vs. Whatcom County,* 15 Wash. 47, 45 Pac. 665, the title to the act challenged was "An Act to provide for the economical management of county affairs". Under this title the act provided that salaries and expenses of certain county officers should not exceed the fees collected on account of their offices. The Court held that the title did not give "a legal notice of the reduction or change of salaries".

We submit that the clause "economical management of county affairs" comes considerably nearer embracing reduction of county officials' salaries than does "protection of anadromous fish life" to embracing limitation or prohibition of hydro-electric power and other industrial development.

In *State ex rel Nettleton vs. Case,* 39 Wash. 177, 184, 81 Pac. 544, the title to the act was "An act in relation to the fees of State and County officers, witnesses and jurors". Under this title the act set up various fees to be charged by the County Clerk ,including a sliding scale of fees in probate proceedings based upon the valuation of the estate. The Court held that such charges were in the nature of a property tax and not a fee. The Court said:

> "By no reasonable exercise of the imagination can it be inferred from the above title that the act treats of the subject of exacting an ad valorem charge or tax from the property of estates. It therefore violates Sec. 19 of art. 2 of our state constitution, which requires that, 'No bill shall embrace more than one subject, and that shall be expressed in the title'."

The Court construed what the above act called a "fee" to be a "property tax", and then held the title insufficient because it did not mention this latter subject. In the case at bar Petitioners seek to construe the act as one limiting or withdrawing powers previously granted to municipalities. But that is not what the legislature in the title of the act said it was going to do. It made no mention at all of municipalities or their powers. It merely said it was going to protect anadromous fish life. If the act is to be so construed, the title does not indicate that it was intended to so legislate, and is therefore invalid.

In *Cawsey vs. Brickey,* 82 Wash. 653, 144 Pac. 938, involving a game law, one of the many words used in the

title was "protection", The Court, in upholding the title, said that its general scope *indicated a bill constituting a complete game code* and that it was sufficient to cover provisions authorizing the creation of game preserves. It seems obvious from reading the case that had the title been one merely relating to the "protection of game birds", etc., it would not have been upheld. Yet in the case at bar a river-system wide sanctuary is created, and in addition dams and industrial construction drastically limited or prohibited therein, under the simple title "protection of anadromous fish life."

In *State ex rel Toll Bridge Authority vs. Yelle,* 32 Wn. (2d) 13, 19, 27; 200 Pac. (2d) 467, the title to the act authorized the purchase and operation of toll bridges, highway and ferry connections and approaches thereto. One section of the act authorized the acquisition of "bridges or ferries which connect with or may be connected with the public highways of the state."

The Court held that the reference to purchase of "ferry connections" in the title was not sufficient to cover the acquisition of "ferries" as provided in the body of the act, and that the act included more than one subject.

A recent pertinent case is *Bellingham vs. Hite,* 37 Wn. (2d) 652, 225 Pac. (2d) 895. In that case the title was:

> "An act relating to police judges in cities of the first class; providing for appeals from judgments in criminal proceedings before such judges and amending title 60 chapter 7, R.R.S., * * *."

It was contended that there was nothing in the title to indicate that the act involved procedure in the superior court. In finding that there was no violation of the Constitution, the Court said:

> "The act itself has reference to superior court procedure only in connection with such appeals. An act dealing with appeals from police courts could scarcely avoid concerning itself with superior court procedure to this extent, and few would be surprised to discover that it did so."

Certainly an act dealing with protection of anadromous fish life could avoid concerning itself with and prohibiting hydro-electric power and industrial development, and most anyone would be surprised that it did so.

d. *Chapter 9, Laws of 1949, Contains an Unlawful Delegation of Legislative Authority, and is Unconstitutional on this Ground.*

Section 1 of the above act prohibits the construction of any dam over 25 feet in height on the river system mentioned "within the migratory range of any anadromous fish *as jointly determined by the Director of Fisheries and the Director of Game*" (Emphasis supplied). Likewise in the same section diversion of the waters of such river system is prohibited "for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow", with the proviso that when the flow is below the annual average "water may be diverted for use, subject to legal appropriation, *upon the concurrent order of the Director of Fisheries and the Director of Game*". (Emphasis supplied).

It is our position that both of these provisions contain an unwarranted and uncontrolled delegation of legislative authority to the two directors, in violation of Article II, Section 1, of the State Constitution, which vests legislative power in the Senate and House of Representatives.

Referring first to the provision for the determination by the two directors of "the migratory range of any anadro-

mous fish". There is no standard or guide in the act by which the two directors are to determine what is or is not within such range. Would it be determined by the movement of a single, or a few, or many fish? It hardly seems that the legislature intended to bar power and industrial development to clear a passage for a single fish. But, for how many? Where is the standard or yardstick by which the Directors are to be controlled and guided? Measured in terms of value, would it be $5.00 of $50,000, or what? Is the range subject to change by stream improvements or other artificial means? Or even from time to time by change of mind or change in the office of directors? We cannot find the answer to these questions in the act. The determination seems to lie in the sole and uncontrolled discretion of the two directors.

Referring next to the proviso permitting diversion of water for use "upon the concurrent order of the Director of Fisheries and the Director of Game". When and under what circumstances would such an order be given? How can anyone tell? It seems to lie wholly within the field of whim and caprice and personal prejudice. It could be granted one person and denied another entirely upon the directors' likes. It could in fact be denied a person on a single director's dislike or prejudice, since the granting of such an order must be concurrent.

The principles involved in this challenge to the constitutionality of the act have been stated by the courts on many occasions. They were last reviewed by the Washington court in the recent case of *State vs. Gilroy,* (1950) 37 Wn. (2d) 1, 221 Pac. (2d) 530. In that case the provisions of Chapter 172, Laws of 1933, were under inquiry. Section 5 of the act provided that any person carrying on the work of caring for children should obtain a certificate of appro-

val for the state director of business control. This certificate was to be issued by the director upon reasonable and satisfactory assurance of

> "(a) The good character and intentions of the applicant;
>
> "(b) The present and prospective need of the service intended by the proposed organization, with no unnecessary duplication of approved existing service;
>
> "(c) Provision for employment of capable, trained or experienced workers;
>
> "(d) Sufficient financial backing to insure effective work;
>
> "(e) The probability of permanence in the proposed organization or institution;
>
> "(f) That the methods used and the disposition made of the children will be in their best interests and that of society;
>
> "(g) Articles of incorporation and related by-laws;
>
> "(h) That in the judgment of the director the establishment of such an organization is necessary and desirable for the public welfare."

The Court first noted Article II, Section 1, of the State Constitution, and then cited the leading cases of *Panama Refining Co. vs. Ryan,* 293 U.S. 388, 421; 79 L. Ed. 446, and *Schechter Poultry Corp. vs. United States,* 295 U.S. 495. 79 L .Ed. 1570, in which are found a detailed discussion and an explanation of the distinction between valid and invalid regulatory legislation. Referring to the two cases, the Court said at page 45:

> "The principle is therein laid down that a law is invalid when the authority delegated leaves the regulatory agency with unguided and unrestricted discretion in the assigned field. Stated affirmatively,

> the method of regulation by delegation of authority is subject to the limitation that the law providing for the delegation must also prescribe an accompanying rule of action or lay down a guide or standard whereby the exercise of discretion may be measured. *State ex rel Washington Toll Bridge Authority vs. Yelle,* 195 Wash. 636, 643, 82 P. (2d) 120; *Ferretti vs. Jackson,* 88 N. H. 296, 188 Atl. 474, 478."

The Court pointed out that under (a) the director must be satisfied of the "intentions" of the applicant, under (b) with the "provisions for employment of capable, trained or experienced workers", and under (d) that the applicant has "sufficient financial backing to insure effective work". The court said that the act contained no criteria as to what the legislature regarded as satisfactory "intentions", or "capable, trained or experienced workers", or "effective work". The whole matter was left to the director as the sole judge. The act was stricken down. When its provisions, supposedly intended as a legislative standard or guide, are compared to the entire lack of any such provisions in the case at bar, it appears that that case is clearly controlling of this.

The act here challenged does contain some detail provisions, such as the 25-foot limit on dams and the definition of "annual average low flow", but these furnish no aid in determining "the migratory range of anadromous fish", nor when to issue a concurrent order.

There just is no standard or guide by which such "migratory range" is to be determined, or any such concurrent order issued. Both determinations lie even more in the sole fiat of the two directors, than did the deterination of good intentions and capable employees and effective work in the *Gilroy* case.

The following additional cases support and fully sustain our position: *State ex rel Markis vs. Superior Court,* 113 Wash. 296, 193 Pac. 845; *State ex rel Washington Toll Bridge Authority vs. Yelle,* 195 Wash. 636, 643; 82 P. (2d) 120.

B.

The Findings and Conclusions of the Commission are Supported by Substantial Evidence.

Section 313 (b) of the Federal Power Act expressly provides that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

This is appropriate, since the Commission is granted "broad administrative and investigative power", and is the "permanent disinterested expert agency of Congress", and the "executant of Congressional policy". *United States vs. Federal Power Commission,* Nos. 28 and 29, USSC October 1952 Term, Decided March 16, 1953.

We have outlined in our statement of the case the abundant evidence that overwhelmingly supports the findings of the Commission. Additional substantiating facts, which space will not permit mentioning, can be found throughout the lengthy record and the many exhibits.

What petitioners have done, in their brief and consistently throughout the proceedings, is to assume without proof and in spite of the proof, that fish values transcend all other values, that some possible fish losses outweigh the great power, navigation, flood control, recreational and other benefits of the project, and that the project should not go forward unless it conclusively appears that it would not result in any "deleterious effect" or other than

"relatively minor" effect, on the fish resources of the river. (R. 70, 106, 163).

In their reference to the evidence Petitioners largely confine themselves to directing attention to statements and other controversial items deemed favorable to themselves, and ignore all contrary evidence. Exhibit 25, and the results of the hatchery program predicted therein by the State Directors is an example.

Most of the findings to which Petitioners except are merely incidental to the principal finding (No. 59) that the project is "best adapted for improving or developing the waterway", which is the only finding required by Section 10 (a) of the Act. Even were these subsidiary findings omitted, the result would remain unchanged. Examples are: that the project is necessary for National Defense; and various items relating to fishery facilities.

The Court should not be called upon to perform the functions of the Commission, or to substitute its judgment for that of the Commission. *National Labor Relations Board vs. Link-Belt Co.,* 311 U.S. 584, 597, 85 L. Ed. 368, 378.

1. The Commission has Acted within its Powers and has Fulfilled its Obligation under Section 10 (a) of the Act.

In their corresponding subheading the Petitioners assert that the Commission has exceeded its powers. They do not point out in what respect.

The Assignments of Error (Nos. 6 to 8) discussed under this subheading go to the Commission's basic finding (No. 59) that the project is "best adapted" for the improvement and development of the river for the purposes specified in Section 10 (a) of the Act. This calls for

a weighing of the values of the different beneficial uses to which the waters of the river may be put. Yet Petitioners make no such comparison. They ignore the values entirely of the power, navigation, flood control and other benefits from the project. They also ignore fish savings.

The Commission's Finding No. 59 is not dependent for its validity upon the classification which the Army Engineers made in the 1948 Review Report of the Cowlitz River for development. The Army Engineers present attitude is expressed in their Section 4 (e) report (Ex. 5) to the Commission in this proceeding, wherein they state that they made no recommendation for federal development in the Review Report "because of the interest of local agencies in undertaking such development and because of the need for correlation of such development by local interests with the need for preservation of fisheries resources". This is neither an expression for or against, but simply a bowing to the Commission as the proper authority for decision.

Petitioners speak repeatedly of the 1948 Review Report as the "Comprehensive Plan", and seem to assume that this is what is meant by the same words found in Section 10 (a) of the Act, when applied to the Cowlitz River. Both the Army Chief of Engineers and the Commission (R. 249) have referred to the 1948 Review Report as a "basic framework" for basin development. It is not intended to be anything more, and Congress has not as yet adopted or approved it even as that. Petitioners say at page 79 that this was "because of pending S. 1645, a bill to establish a Columbia Valley Authority", but this is an unwarranted surmise on their part.

Even if the 1948 Review Report had been adopted and approved by Congress, it would not have restricted the broad and comprehensive authority of the Commission as

the chosen expert Agency of Congress to deal with the Cowlitz River within the basic framework.

The "waterway or waterways" referred to in Section 10 (a) of the Act, are expressed in the singular or plural, and the *one* with which the Commission is dealing here is the Cowlitz River. The Commission found that the proposed project is "best adapted" to a "comprehensive plan" for *its* development, and this was after giving consideration to the "basic framework" contained in the 1948 Review Report. The City as a condition to its application was not required to submit a comprehensive plan of development for the whole Columbia River basin, and neither was the Commission Staff.

On page 78 Petitioners state that "the necessity of preservation of the Cowlitz for fish runs will constantly be increased many times as the Columbia above Bonneville" is further utilized for power purposes. This is wholly unwarranted and misleading. The Cowlitz has no such potential. The Petitioners' fishery witnesses testified that the spawning areas were now saturated and being utilized to the full potential. See admission, page 103 Petitioners' brief.

The contract dated June 23, 1948, between the states of Washington, Oregon and Idaho, and the U.S. Fish and Wildlife Service (Ex. 33) referred to on page 79, makes no mention of the Lower Columbia River Fisheries Plan, and is in no way dependent thereon, and no expenditure planned thereby would be less useful or have to be abandoned because of the development of the Cowlitz River (Ex. 31).

2. There is Substantial Evidence to Support the Commission's Finding that:

a. *There is and will be a severe power shortage in the Pacific Northwest for several years.*

(Specifications of Error 9, Findings 17, 20, 21)

b. *The Federal Construction Program will not meet power demands.*

(Specifications of Error 9, Finding 16)

c. *The Proposed Project will help greatly to alleviate the power shortage.*

(Specifications of Error 10, Findings 22, 23)

d. *There are no comparable alternate sources of power available to the City.*

Specifications of Error 11, Findings 26, 28)

e. *The Proposed Project will assist in and is needed for the Defense Program.*

(Specifications of Error 12, Findings 13, 18, 20)

f. *The Benefits to be Derived from the Project outweigh Fish Values.*

(Specifications of Error 13, Findings 8, 25, 32)

These are all subsidiary or supporting findings. Perhaps the only one essential to the ultimate determination of the "best adapted" use of the waters of the river is the last one, but examination of Specifications of Error 13, and of Findings 8, 25 and 32 therein challenged, shows that they relate merely to recreational opportunities, power assistance to the Portland area during flood periods, and navigation benefits to which no monetary value is assigned. There is no comparison made of these with fish or other values.

In our Statement of the Case, consistent with the demands for brevity, we have set forth at some length the evidence herein. This evidence overwhelmingly supports the Commission's Findings. The Commission could not properly have found otherwise than it did.

First, as to the power shortage in the Pacific Northwest. The Bulletins and Reports of the Commission show this shortage to be the most critical in the nation. The action of the Washington Public Service Commission in restricting the taking on of new power loads (Ex. 60), the voluntary action of public agencies to the same end (R. 1266), the repeated urgent demands for power expansion by both the private and public power members of the Pacific Northwest Utilities Conference Committee (Ex. 21, sub. ex. 3, 4, 5), the studies and conservative forecasts (without allowance for new defense and aluminum loads) in the Bonneville Power Administration's 1950 Advance Program (Ex. 23), the Section 4 (c) statement of the Secretary of the Interior (Ex. 6), the letter of the Chairman of the National Defense Resources Board (Ex. 64B), the studies of Mr. Ward, City Engineer (Ex. 21), the testimony of public and private utilities executives (R. 913, 1059, 1158, 1365), and of the labor, veterans, business, professional, commercial, industrial, agricultural and other witnesses at the public hearing, and the studies of the Commission Staff (Ex. 52 to 56A, inc.), all demonstrate and attest this power shortage and its acuteness. There is in fact no substantial counter evidence.

Petitioners assert (p. 81) that the Commission's Findings place unwarranted emphasis on "critical water year". The Pacific Northwest has for the past several years been operating to the hilt on *above average rainfall*. The Department of the Interior letter (Ex. 6) points out that

only under such conditions will it be able to meet most of its needs for the next several years. This does not include new defense or aluminum demands (Ex. 23). The Bonneville Power Administration has for years been selling power on an interruptable basis (Ex. 23). Sound operation should meet demands and still allow a margin of safety. There must be some provision for failures and breakdown.

Finding 16 merely states that "the various Federal schedules known as "Advance Programs" show that the estimated time when new generating units would be placed in operation in the Columbia River Basin have not been met". They do so show. That the federal program alone will not meet potential demands is the concensus of opinion of all the foregoing (Ex. 21, p. 34). It has never been contemplated, at least by Congress, that the federal government should become the sole supplier of electricity in the Pacific Northwest.

Findings 22 and 23 state the need for and exceptionally valuable features of the proposed project, and add that "if made within three years", it would "assist greatly" in alleviating the power shortage. This is a correct comment, and but for the Petitioners' action it might have been substantially realized. It does not follow that because delay has been encountered the project loses its value. Such value may be even increased. Other projects, including the government's own, have suffered delay. The two years allowed in the License for commencing construction is a standard provision. It does not mean the Licensee will wait that long after litigation is cleared before commencing construction. That the proposed project will assist greatly to alleviate the power shortage seems obvious from the fact that it will add 10% to the present total plant capacity of the entire Pacific Northwest power pool.

Finding 26 is that "none of the hydroelectric projects suggested for construction in lieu of the Cowlitz Project can be constructed as quickly or as economically", and Finding No. 28 that "the only new sources of power supply in substantial quantities that could be constructed by the Applicant and placed on the line in 1954 consist of the proposed Cowlitz Project and new steam electric plant". The testimony and studies of Mr. Ward discuss fully alternate sites (Ex. 21, pp. 42-53), and steam plants (Ex. 21, pp. 20-31). These alternate sites are neither comparable nor available. The Commission Staff's studies (Ex. 48, 49, 52) also cover comparative steam plant costs. They exceed those of the proposed project by $1,700,000 annually. See Finding 31.

Petitioners refer (p. 84) to the additional power that will be made available by the Yale and Rock Island projects. The power from these projects is included in present forecasts (Ex. 23, 26).

Petitioners refer (pp. 84-85) to House Resolution 4963 pending before Congress and proposing government construction in the Pacific Northwest of 400,000 K.W. capacity steam plants as a possible additional source of power. This resolution calls for a broad determination of whether the Federal government desires to enter into steam as well as hydroelectric generation. The present project should not be rejected on the assumption that Congress will adopt the new policy.

The statements contained in Findings 13, 18 and 20 are fully sustained by the record (Ex. 60, 23, 26). That the proposed project will aid in furnishing badly needed power for defense purposes seems obvious. The defense program is an overall longtime buildup effort and contemplates great increases in the nation's power resources. The chairman

of the National Defense Resources Board specifically endorsed the project(Ex. 64B).

The comparative values between power, navigation, flood control and incidental recreational benefits, and fish losses are discussed in our statement of the case under subheadings "The Proposed Project—Its Scope and Importance" and "The Cowlitz River and its Fisheries". They are further discussed under subheading B 1 above. These comparisons show that power and related values far exceed fisheries losses, even assuming all fish were lost. The Examiner says as much as "seven or eight to one", using a monetary yardstick (R. 143). We think the record shows it is even more.

3. There is Substantial evidence to support the Commission's Findings that:

a. *the Fish Runs in the Cowlitz will not be substantially destroyed*

(Specification of Error 14. Finding 41)

b. *a substantial portion thereof will be saved*

(Specification of Error 15, Finding 48)

c. *the City's proposed conservation practices, facilities and improvements should be carried out*

(Specification of Error 16, Finding 42)

d. *the hatcheries proposed by the City can be constructed ,operated and maintained at the cost estimated*

(Specifiication of Error 17, Findings 47, 49, 50, 51).

These are all subsidiary findings, and all relate to the fish facilities. They might all have been omitted without affecting the validity of the Order. The items designated c and d are particularly insignificant.

The City in Exhibit 14, prepared by Drs. Strunk and Hubbs, proposed certain practices, facilities and improvements for conservation of the fishery resources in the Cowlitz River watershed in addition to the facilities proposed for installation at the dams. These consisted of such things as biological studies, research, surveys of spawning areas, removal of stream blocks and debris, laddering of falls, abatement of polution, location of hatcheries sites, etc. This proposal was in general terms with detail left to be developed if the license was issued. It is this proposal which the Commission in Finding 42 says is not sufficiently detailed "to permit an adequate appraisal" of its effectiveness, but that it shows "enough promise to justify the carrying through of more detailed studies and plans". It is hard to see how this mild finding could have affected the Commission's decision, or how petitioners could be in any way prejudiced thereby. The Commission apparently attached no particular weight thereto.

By Finding 47 the Commission estimated the annual cost of operating and maintaining the fish facilities plus the fixed charges on the investment therein at $610,000. It then used this estimate in Findings 49, 50 and 51 in comparing its estimated power value ($1,700,000 annually) with its estimated fish losses based on three different assumptions, including one with no saving of fish at all. In each instance the balance clearly favored power values. Petitioners challenge the $610,000 estimate. It was derived by the Commission Staff from the estimated cost of constructing and operating the fish facilities and hatcheries as contained in Exhibits 10 (City Consulting Engineer's) and 25 (State Departments). The estimated cost, however, is one which the City is required by Article 31 of the License to assume and pay, whatever it may be, and Petitioners are and were in no way prejudiced thereby, even

if it is uncertain. It seems ample, however, and exceeds the entire annual net dollar value ($600,000) of the fish above Mayfield dam (see Finding 44).

Some of Petitioners' Specifications of Error are taken to language in the Commission's Opinion, as distinguished from its Findings. This seems inappropriate. Findings 41 and 48, included in Specifications of Error 14 and 15, refer only to downstream migration facilities and to the fishery resources below Mayfield dam, so that the claim of error is properly restricted thereto. However, taking the assertions contained in Petitioners' subheadings (p. 90) at their full meaning as they appear, they still are not well taken. They wholly ignore the State Directors' statements in Exhibit 25 as to the saving of fish. That Exhibit clearly shows that through a hatchery program not less than three-fifths of the fish values can be saved, and with intensive propogation possibly all. And if the City's proposed downstream fish handling facilities work (the U. S. Fish and Wildlife Service cannot say that they won't), an increase in fish production may well result, and the problem of fish and power, not only on the Cowlitz River but elsewhere, will be solved (Ex. 8). This should be worth while experimentally.

Loss of spawning area will be largely, if not entirely, replaced through the hatchery program (Ex. 25, 28), and the regulated and increased minimum flow of the river below Mayfield dam (Ex. 5, 14, p. 79), and the increased spawning area made available there (Ex. 28, p. 16) should improve the fishery potential in that area as found by the Commission.

Petitioners in this portion (pp. 91-105) of their brief discuss a great deal of the detail of the proposed fish handling facilities ,and renew the contentions which they made before the Commission in connection therewith. No good

purpose would be served by our replying thereto in detail here. Rather we respectfully refer the Court, if desired, to the material set forth in the Supplement to our Exceptions to the Examiner's Recommended Decision appearing in the Record as follows:

Issues to be Resolved (R 340)

Upstream Migration—Trapping and Hauling (R 341)

Downstream Migration Facilities (R 343)

Description of Downstream Migration Facilities (R 345)

Entrance Ports to Fingerling System (R 347)

Risers of Fingerling System (R 349)

Matters of Hydraulic Resign (R 350)

Fingerling System Operating Cycle (R 350)

Screening Fingerlings (R 351)

Keeping Screens Clean (R 354)

According to Plan (R 356)

Period for Further Research (R 357)

Construction Period Affords Time for Model Tests and Further Experimental Work (R 359)

Problems Stated in State Departments' Report and Solutions Suggested (R 362)

City's Proposed Fish Migration Facilities Developed Following State Departments' Report (R 364)

State Departments' Report Suggests Trapping and Hauling Upstream Migrants. City Would Add Ladders. (R 365)

State Departments' Report Suggests Artificial Propagation Because of No Known Adequate Downstream Migration Facilities (R 366)

Lower Columbia River Fisheries Plan (R 367)

Observations of the Laythe Report—Exhibit 32 (R 371).

C.

The Order Properly Provides for Further Studies and Tests of Fish Facilities in Cooperation with the Federal and State Agencies. It does not provide for Management of the Fishery Resource by the City

Assignments of Error 18 through 20 are discussed hereunder.

The Commission in issuing the license was executing the powers entrusted to it by Congress. It did not proceed arbitrarily or capriciously or in abuse of discretion as charged by Petitioners. It rather engaged in a long and expensive hearing given over largely to receiving evidence about the fishery resources of the river and their protection. The Order as finally issued makes provision for extensive fish facilities to be worked out by the City in cooperation with the U. S. Fish and Wildlife Service and the State agencies of Fisheries and Game. There is no reason to believe that these facilities will be anything less than the most modern, scientifically and efficiently, that these officials can recommend. It is not to be assumed that the Commission, in dealing with these resources of the State, will act harshly or unjustly in connection therewith. The Court in *United States vs. California,* 332 U.S. 18, 41, 91 L. Ed. 1889, 1900, an off-shore oil case, said in this respect:

> "But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustice to states, their subdivisions, or persons acting pursuant to their permission."

The only thing is that, in view of the relative values found, the State agencies cannot themselves arbitrarily and capriciously refuse to recommend or approve any facilities.

The provisions for testing are consistent with the comparative values involved. Since the power and other benfits far exceed the entire fish values, it is not essential that all fish, or even any more than now seem likely, be saved in order to meet the criteria of Section 10 (a). To require testing over a double life cycle of the several runs of fish, as Petitioners suggest, would result in the loss during the period of testing of far more power values than would be gained in fish saved. The amount which the City is called upon to spend annually for fish facilities will exceed the entire annual value of the fish runs (Findings 44, 47).

The Petitioners seem to proceed throughout their brief on the assumption that the loss of any fish should bar the construction of any dam. They say (p 107) with reference to protective devices "it is not sufficient that it be capable of passing a portion of a run". Why not? Some saving should be better than none. Are hatcheries to be abandoned because they might only maintain the Fall Chinook and Silver runs (three-fifths of the whole), and a portion of the others?

Petitioners repeatedly speak of protecting "the fisheries resources", or of losing runs, or of "a valuable state resource" being jeopardized or placed at the mercy of the proposed devices, as if the entire fishery resources of all the streams and waters of the State and the Pacific Northwest hinged upon each feature of every device of the proposed facilities. This just is not so, and the Commission has correctly analyzed and so found.

Petitioners protest that provision should be made for withdrawal of the License if tests do not develop facilities capable of saving all of the fish. In view of the Commission's determination of relative values, no such thing is or was intended. It is only required that the best known or hereafter developed facilities be installed. On the basis of present knowledge this should have substantial success. Any such provision for withdrawal would destroy the effectiveness of the license and render financing impossible.

Insofar as they are entitled to it, Petitioners have had their opportunity for hearing, and will continue to have it hereafter. Article 30 of the License provides that the City shall conduct its studies and tests and work out the final design plans in cooperation with the U. S. Fish and Wildlife Service and the State Agencies, and it is not to be presumed that the Commission would refuse to heed good suggestions or hear any complaint about non-cooperation.

The Order does not place the management of the fisheries in the City. The City is given no right to control or regulate the taking of fish or otherwise to legislate concerning the same. It is merely required, consistent with the Federal Power Act, to construct the fish facilities and to pay the cost thereof and of operating and maintaining the same. The fact that the Commission has final say on these facilities is an exercise of commerce power, and not of any power to regulate or manage fisheries.

CONCLUSION

We respectfully submit:

That the Commission had full jurisdiction and authority to enter its order issuing the License to the City;

That the City is not required to comply with those State laws which have been superseded by the Federal Power Act, or are invalid;

That the Findings of the Commission are supported by substantial evidence and its conclusions are correct;

That the Order of the Commission should be affirmed.

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APPENDIX

CHAPTER 9, LAWS OF 1949, WASHINGTON
R.C.W. 75.20.010 - 75.20.030

AN ACT relating to the protection of anadromous fish life in the rivers and streams tributary to the lower Columbia River and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be constructed thereon any dam of a height greater than twenty-five (25) feet that may be located with in the migration range of any anadromous fish as jointly determined by the Director of Fisheries and the Director of Game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports: Provided, That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation, upon the concurrent order of the Director of Fisheries and Director of Game.

SEC. 2. It shall be the duty of the Director of Fisheries and the Director of Game, to acquire and abate any dam or other obstruction, or to acquire any water-right which may have become vested on any stream or rivers tributary

to the Columbia River downstream from McNary Dam which may be in conflict with the provisions of section 1 herein. Any condemnation action necessary under the provisions of this act shall be instituted under the provisions of chapter 120, Laws of 1947, and in the manner provided for the acquisition of property for public use of the state.

SEC. 3. The provisions of this act shall not apply to the waters of the North Fork of the Lewis River, nor the White Salmon River (Big White Salmon River).

SEC. 4. This act is necessary for the immediate support of the government of the State of Washington and its existing public institutions, and shall take effect April 1, 1949.

SECTIONS 46 and 49, CHAPTER 112, LAWS OF 1949, WASHINGTON, R.C.W. 75.20.050 and 75.20.100

SEC. 46. It is hereby declared to be the policy of this state that flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

The Supervisor of Hydraulics shall give the Director of Fisheries and the Director of Game notice of each application for a permit to divert water, or other hydraulic permit of any nature, and the Director of Fisheries and Director of Game shall have thirty (30) days after receiving said notice in which to state their objections to the application, and the permit shall not be issued until the thirty (30) days period provided for herein has elapsed.

The Supervisor of Hydraulics may refuse to issue any permit to divert water, or any hydraulic permit of any nature, if, in the opinion o fthe Director of Fisheries or Director of Game, such a permit might result in lowering the flow of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream.

The provisions of this section shall in no way affect existing water rights.

SEC. 49. In the event that any person or government agency desires to construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds, such person or government agency shall submit to the Department of Fisheries and the Department of Game full plans and specifications of the proposed construction or work, complete plans and specifications for the proper protection of fish life in connection therewith, the approximate date when such construction or work is to commence and shall secure the written approval of the Director of Fisheries and the Director of Game as to the adequacy of the means outlined for the protection of fish-life in connection therewith and as to the propriety of the proposed construction or work and time thereof in relation to fish life, before commencing construction or work thereon. If any person or government agency shall commence construction on any such works or projects without first providing plans and specifications subject to the approval of the Director of Fisheries and the Director of Game for the proper protection of fish life in connection therewith and without first having obtained written approval of the Director of Fisheries and the Director of Game as to the adequacy of such plans and specifications submitted for the protection of fish life, he shall be guilty of a gross misdemeanor. If any such person or government agency be convicted of violating any of the provisions of this act and continues construction on any such works or projects without fully complying with the provisions of this act, such works or projects are hereby declared a public nuisance and shall be subject to abatement as such.

Provided, however, That in case of an emergency arising from weather or stream flow conditions the Department of Fisheries or Department of Game, through their authorized representatives, shall issue oral permits to a riparian owner for removing any obstructions or for repairing existing structures without the necessity of submitting prepared plans and specifiications.

PERTINENT SECTIONS FEDERAL POWER ACT
16 U.S.C.A. 791a et seq.

Sec. 797. *General Powers of Commission*

Sec. 4. The commission is hereby authorized and empowered—

* * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories) or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: * * *

Sec. 802. *Information to accompany application for license.*

Sec. 9. Each applicant for a license under this chapter shall submit to the commission—

* * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting ,and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

* * *

Sec. 803. *Conditions of license generally*

Sec. 10. All licenses issued under sections 791-823 of this title shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifiications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefits of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * *

Sec. 817. *Projects not affecting navigable waters; necessity for Federal license*

Sec. 23 (b). It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * *

Sec. 821. *State laws and water rights unaffected*

Sec. 27. Nothing contained in this chapter shall be constructed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

* * *

Sec. 825 l. *Rehearings; court review of orders*

Sec. 313 (a). Any person, State, municipality, or State commission agrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b). Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the license or public utility to which the order relates is located or has its principal place of business, or

in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject

to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c). The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

WILD LIFE RESOURCES ACT OF AUGUST 14, 1946
16 U.S.C.A. 662, as amended August 14, 1946

Sec. 662. *Impounding of waters; consultations between agencies; items and allocation of costs*

Whenever the waters of any stream or other body of water are authorized to be impounded, diverted, or otherwise controlled for any purpose whatever by any department or agency of the United States, or by any public or private agency under Federal permit, such department or agency first shall consult with the Fish and Wildlife Service and the head of the agency exercising administration over the wildlife resources of the State wherein the impoundment, diversion, or other control facility is to be constructed with a view to preventing loss of and damage to wildlife resources, and the reports and recommendations of the Secretary of the Interior and of the head of the agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the Fish and Wildlife Service and by the said head of the agency exercising administration over the wildlife resources of the State, for the purpose of determining the possible damage to wildlife resources and of the means and measures that should be adopted to prevent loss of and

damage to wildlife resources, shall be made an integral part of any report submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects.

The cost of planning for and the construction or installation and maintenance of any such means and measures shall be included in and shall constitute an integral part of the costs of such projects: Provided, That, in the case of projects after August 14, 1946, authorized to be constructed, operated, and maintained in accordance with sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 476, 491, and 498 of Title 43, and Acts amendatory thereof or supplementary thereto, the Secretary of the Interior shall, in addition to allocations to be made under section 485h of Title 43, make findings on the part of the estimated cost of the project which can properly be allocated to the preservation and propagation of fish and wildlife, and costs allocated pursuant to such findings shall not be reimbursable. In the case of construction by a Federal agency, that agency is authorized to transfer, out of appropriations or other funds made available for surveying, engineering, or construction to the Fish and Wildlife Service, such funds may be necessary to conduct the investigations required by this section to be made by it.